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The Application of EU Law Beyond Its Borders

Federico Casolari and Mauro Gatti (eds.)

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FEDERICO CASOLARI AND MAURO GATTI (EDS.)

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INTRODUCTION

Federico Casolari* and Mauro Gatti**

This publication is the result of work conducted at the 6th Jean Monnet Doctoral Workshop (18-19 March 2021): *The Extraterritorial Application of EU Law: A Contribution to its Global Reach*. The Workshop was organised by the University of Bologna (Department of Legal Studies), in collaboration with the Universities of Geneva, Groningen, Leuven, Pisa, and Rome 'Sapienza'. The Workshop took place online due to Covid restrictions.

The 6th Jean Monnet Doctoral Workshop was held after a string of successful events, starting with a Doctoral Workshop, organised by Christine Kaddous at the University of Geneva in 2015. Following the established format of Jean Monnet Doctoral Workshops, the March 2021 event saw several young scholars, selected through a call for papers, present their research to distinguished discussants and to a worldwide public audience. This publication includes the papers presented at the Workshop, revised in light of the fruitful debates that took place during the event and the in-depth review carried out by the discussants.

The Workshop sought to stimulate reflections on the application of EU law beyond its borders, by stressing its legal implications for EU external action and the EU legal order as a whole. Thanks to the growing network of contractual relationships established by the European Union with third countries and other international organisations, the extension of the Union's competences, and the doctrines developed by case law of the European Court of Justice, the possibility of applying EU law outside the Union's borders is a reality, representing a pillar of the EU's external dimension.

Literature has drawn a distinction between 'pure' extraterritorial application and different forms of application of EU law beyond its borders. The notion of pure 'extraterritoriality' is hotly contested, as different traditions exist in different countries and in different fields of law.¹ Scott – who delivered the keynote speech at the 6th Jean Monnet Doctoral Workshop – defines extraterritoriality as 'the application of a measure triggered by something other than a territorial connection with the regulating state'.² Extraterritoriality can be distinguished from 'territorial extension', that is, the application of a measure triggered by a connection with EU territory, although in applying the measure the regulator must

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¹ P. Szigeti, 'In the Middle of Nowhere: The Futile Quest to Distinguish Territoriality from Extraterritoriality', in D. S. Margolies, U. Özsu, M. Pal, N. Tzouvala, *The Extraterritoriality of Law: History, Theory, Politics* (Milton Park: Routledge 2019), 30-49.

² J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *The American Journal of Comparative Law* 2014, 87-125, at 90.

take account of conduct or circumstances abroad.³ The ‘mimicking/transfer/copying or integration of European rules, practices or ideals into other third party contexts’⁴ can also take place in other ways. Third country companies may decide to comply with EU standards even when they produce goods for non-EU markets, while third country authorities may seek to incorporate EU standards into their domestic laws.⁵ In addition, EU standards may be mainstreamed through bilateral and multilateral agreements: the EU routinely engages in cooperation at bilateral and multilateral level ‘to ensure that European norms are a reference for global standards’.⁶

The application of EU law beyond its borders has occasionally been contested on the basis that it is claimed to infringe the sovereign rights of third countries.⁷ Extraterritoriality, in the strict sense, is traditionally seen as being inconsistent with principles of territorial sovereignty and non-interference in internal affairs: ‘territorial sovereignty belongs always to one [...] to the exclusion of all others’.⁸ However, there is a movement ‘towards bases of jurisdiction other than territoriality’,⁹ particularly in the field of criminal law, where the principles of active and passive nationality are usually accepted¹⁰ and the principle of universal jurisdiction is increasingly applied.¹¹ Furthermore, some international subjects, including the EU, have justified the ‘territorial extension’ of their laws by invoking the ‘effects doctrine’: for instance, the fact that an undertaking participating in an anticompetitive agreement is situated in a third country does

³ Ibid.

⁴ E. Fahey, ‘Introduction: On Framing Convergence of the EU with the Global Legal Order’, in E. Fahey (ed.), *Framing Convergence with the Global Legal Order: The EU and the World* (Oxford: Hart 2020), 1-22, at 4.

⁵ A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press 2020). On the relationship between the Brussels Effects and extraterritoriality and territorial extension, see J. Scott, ‘The Global Reach of EU Law’, in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 21-63, at 31.

⁶ M. Cremona, ‘Expanding the Internal Market: An External Regulatory Policy for the EU?’, in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford: Oxford University Press 2013), 162-177, at 170.

⁷ Cf., e.g., Opinion of AG Kokott, Case C-366/10, *Air Transport Association of America and Others* [2011] EU:C:2011:637, para. 143.

⁸ *Island of Palmas case* (Netherlands, USA), Arbitrator: Max Huber, Reports of International Arbitral Awards, Vol. II, 829-871, at 838; see also, to that effect, Council Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, OJ L 309/1, 29.11.1996, preamble, sixth paragraph; Opinion of AG Hogan, Case C-124/20, *Bank Melli Iran* [2021] EU:C:2021:386, paras 4 and 77.

⁹ ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 47.

¹⁰ See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 5(1)(b) and (c); see, in addition, M. T. Kamminga, ‘Extraterritoriality’, in Max Planck Encyclopedia of Public International Law (Oxford: Oxford University Press 2020), paras 11 and 12.

¹¹ See e.g. the recent case of the alleged member of the Syrian secret services sentenced to life imprisonment in Germany, see *Lebenslange Haft u.a. wegen Verbrechens gegen die Menschlichkeit und wegen Mordes – Urteil gegen einen mutmaßlichen Mitarbeiter des syrischen Geheimdienstes*, 13 January 2022, <<https://olgko.justiz.rlp.de>>.

not prevent the application of EU competition rules if that agreement is effective in the EU territory.¹²

The contributions contained in this publication address several issues regarding the application of EU law beyond its borders. **Lonardo** discusses the rationale for the extraterritorial application of EU law, suggesting that it does not necessarily constitute a form of distrust for other States and their laws: 'external trust' may lead to both more and less extraterritoriality. The other papers focus on case studies, discussing the issues raised by the application of EU law beyond its borders in different policy fields. **Benini**, by focusing on private international law, suggests that the rules which trigger the reach of EU laws beyond EU borders are in competition with EU conflict of law rules. Some contributions suggest that the EU employs extraterritoriality in the strict sense but not very frequently. This is the case, in particular, of EU criminal law: the EU legislator systematically includes active personality as jurisdictional grounds, as described by **Grossio**. Evidence of extraterritoriality is also found in fishery policies: according to **Gohier**, some pieces of EU law apply to fishery operations that have an extremely tenuous connection with the EU territory. The EU's promotion of human rights in third countries, according to **Navasartian Havani**, has at least extraterritorial *ambitions* as it is aimed at 'exporting' EU values to third countries. Furthermore, EU migration law might be extraterritorially applicable: **Sinha** argues that EU legislation could be interpreted as binding French officers who are present in the UK territory carrying out border controls. The reasons why a third country might accept the extraterritorial application of EU migration law are explored by **Lujic** and **Schardey**: in conducting a political science analysis, they suggest that Serbia accepted the 'extraterritorialisation' of EU migration rules, despite constituting a 'sovereignty loss', because its leaders framed it as a solution to the 'sovereignty loss' deriving from increased migration.

In most cases, the application of EU law beyond EU borders arises not in the form of extraterritoriality in the strict sense but by way of 'territorial extension'. This technique is indeed used in all policy fields studied in these collected papers. For instance, **Furtak** demonstrates that, in the field of civil aviation, the EU has repeatedly employed measures to extend its regulatory jurisdiction beyond its territory, in areas ranging from air traffic management to passenger rights. **Pau** discusses the use of territorial extension to promote energy security in Europe, through an analysis of the Commission's (unsuccessful) attempt to extend the territorial scope of EU sector-based legislation on the internal market of gas to pipelines connecting a third country and a Member State. Moreover, equivalence decisions regarding financial market regulations form the subject of territorial extension, as shown by **Royero Ávila**, as they are dependent upon the EU's evaluation of third countries' legislation. Similarly, adequacy decisions guarantee the territorial extension of EU data protection law, although **Rák** argues that, when it comes to health-related data, they should ideally be complemented by other legal instruments and technical measures.

¹² ECJ, Case C-413/14 P, *Intel v Commission* [2017] EU:C:2017:632, para. 43; see, in addition, Opinion of AG Szpunar, Case C-507/17, *Google LLC* [2019] EU:C:2019:15, paras 50-53.

Several papers explore the application of EU law beyond its borders through the conclusion of international agreements with third countries and their interaction with extraterritoriality and territorial extension. **Bergamaschi** demonstrates that several Association Agreements involve the export of EU state aid rules to associated countries. The Trade and Cooperation Agreement (TCA) with the UK, in particular, refrains from using state aid jargon, but replicates EU state aid rules in many other ways, as described by **Agnolucci**. The mainstreaming of EU rules through international agreements, at any rate, is used synergistically with other techniques for the application of EU law beyond its borders: as suggested by Bergamaschi, territorial extension might be used as a replacement for the 'export' of rules through international agreements when the conclusion of these agreements proves impossible.¹³

This publication was made possible thanks to the cooperation of the scholars involved in the Jean Monnet Doctoral Workshop, who kindly acted as chairs or discussants in March 2021: Enzo Cannizzaro, Christine Kaddous, Sara Poli, Ramses Wessel, and Jan Wouters. We are deeply grateful to Joanne Scott, who agreed to deliver the keynote speech at the Workshop, as well as to our esteemed colleagues who acted as panel chairs (Peter Van Elsuwege and Pietro Manzini) and discussants (Giacomo di Federico, Elaine Fahey, Andrea Ott, Cécile Rapoport, and Juan Santos Vara). Our thanks are also extended to CLEER, for the enthusiastic support for this editorial project. We acknowledge the Department of Legal Studies at the *Alma Mater Studiorum*, University of Bologna, and the Project 'International legal obligations related to Prevention, Preparedness, Response and Recovery from CBRN events and status of their implementation in Italy (CBRN-Italy)', funded by the Italian Ministry of Education, University and Research under the PRIN Programme (*Programmi di Rilevante Interesse Nazionale*), Grant Agreement n° 20175M8I32, whose financial support enabled this publication. We would obviously also like to thank the scholars who contributed to the Workshop and to this publication through their professionalism and patience.

Bologna, June 2022

¹³ See also, to that effect, the chapter by Pau. Gohier also suggests that the EU seeks to 'export' its fishery rules through multilateral agreements and when these agreements do not go far enough, the EU complements them with unilateral rules having extraterritorial reach. Conversely, Rak suggests that international agreements might be used to compensate for the shortcomings caused by the territorial extension of EU rules.

THE EXTRATERRITORIAL REACH OF EU LAW: A MATTER OF EXTERNAL TRUST?

Luigi Lonardo*

1. INTRODUCTION

The concept of external trust forms the basis of the analysis contained in this chapter.¹ Is the EU's lack of 'trust' in third countries and their regulatory systems a possible explanation for the extraterritorial effects of EU law? This is the provocative hypothesis that forms the foundation of this paper, positioned squarely in the study of EU external relations law (it studies the EU's internal mechanism for managing its relationships with third countries), analysing the perspective of 'trust' to consider if it can shed any light on the phenomenon to which this edited collection is dedicated: the extraterritorial reach of EU law.

This chapter therefore provides a reflection on one of the ways in which EU law has some influence extraterritorially (in international organisations and third countries, and in relation to non-state entities, such as companies and individuals in those third countries): the chapter considers whether trust can explain extraterritoriality. The term 'extraterritoriality' is used to refer to instances when the EU enacts and enforces 'rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication or enforcement.'² In her work on the topic, Scott distinguishes between the EU's enactment of extraterritorial legislation, on the one hand, and the legislative technique of 'territorial extension', on the other (territorial extension occurs when 'the application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad').³ The former is a rare occurrence, whereas the latter is an increasingly frequent phenomenon.⁴ The distinction drawn by Scott is important as it explains some of

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¹ While the definition is developed in Section 2, this chapter considers trust as meaning 'not taking precautions against an interaction partner'.

² M. Kamminga, 'Extraterritoriality' (2020) Max Planck Encyclopedia of International Law. The chapter will therefore not consider forms of indirect extraterritorial effects, such as regulatory convergence whereby third countries may decide to abide by EU rules without the EU explicitly enacting them for that purpose.

³ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87, 90.

⁴ For the second proposition see, also, A. L. Parrish, 'Reclaiming International Law from Extraterritoriality' (2009) 93 *Minnesota Law Review* 815, 818, stating that '[T]he number of U.S. lawsuits where American laws are applied extraterritorially to solve global problems has grown. This trend, however, is not peculiar to the United States. Increasingly other countries are also applying their laws extraterritorially to exert international influence and solve transboundary challenges'.

the developments discussed in this paper which amount, in practice, to the extraterritorial reach of EU law: restrictive measures or instruments aimed at preserving financial stability.

The initial hypothesis of this paper is that the extraterritoriality of EU law may be a manifestation of the EU's distrust in other regulatory systems. In Scott's words, 'the growth of the EU as an international economic actor is said to have augmented the EU's interest in regulating foreign behavior that generates EU market effects.'⁵ This augmented interest may be due to the fact that the 'foreign' actors' ability⁶ or motivation is not to be trusted, hence the EU needs to regulate such behaviour. One could even take the extreme view, more generally, that the EU is a better regulator than other countries and for this reason EU law should apply even in the territory of those countries. Even though this author does not share this view, it would explain extraterritoriality out of 'distrust'.

The enactment of extraterritorial legislation, traditionally carried out by the United States⁷ rather than by European countries, appears to be prohibited by customary international law,⁸ although the specific contours of this prohibition cannot be identified with any real accuracy.⁹ For example, some grounds for establishing extraterritorial jurisdiction are recognised as being permitted by customary international law, 'relative to the rights of other states.'¹⁰ On one end of the spectrum, international law may impose extraterritorial duties on states;¹¹ in fact, one objective of EU external action is to 'consolidate and support democracy, the rule of law, human rights and the principles of international law.' (Article 21(2)(b) TEU).¹² At the other end of the spectrum, extraterritorial legislation has quasi-imperialistic undertones, amounting to the transfer of regulatory power to another sovereign (insofar as certain situations occurring within

⁵ J Scott (n 3) 88.

⁶ P. Davies, *Financial Stability and the Global Influence of EU Law* in M. Cremona and J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019) 146 explains the extraterritorial reach of EU law in the domain of financial stability (as opposed to other areas) as follows: 'the probability of contagion from failure in one jurisdiction to other jurisdictions is very much higher'.

⁷ See developments described in Note, 'Developments in the Law of Extraterritoriality' 124 *Harvard Law Review* (2011) 1226.

⁸ *Restatement (Fourth) of the Foreign Relations Law of the United States* § 432(2) (Am Law Inst 2018).

⁹ See also ECJ, Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*, [2011] ECR para 110 in section 3 below.

¹⁰ J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 8th ed. 2012) 457.

¹¹ M. Langford, F. Coomans and F. Gómez Isa, 'Extraterritorial Duties in International Law' in M. Langford, W. Vandenhoele, M. Scheinin and W. van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press 2012) 51.

¹² See S. Velluti and V. Tzevelekos, 'Extraterritoriality of EU Law and Human Rights after Lisbon: The Case of Trade and Public Procurement' (2018) *Europe and the World: A Law Review*; and A. Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) *Europe and the World: A Law Review*.

the territory of that sovereign are also regulated by the law of another sovereign)¹³. In a dissenting opinion in the *Lotus* case, Judge Weiss argued that not objecting to foreign extraterritorial jurisdiction in matters that intrude in a state's own territory would amount to the affected state not assuming its duties as a state.¹⁴

In slightly anticipating the conclusions, it is noted here that while this hypothesis can be confirmed with reference to individual instances of EU extraterritorial application, there are other cases where there is simply no evidence to support it. In addition, the hypothesis can be disputed conceptually as the EU might regulate situations with extraterritorial effects not as a result of its distrust in other states, but in the belief that the challenge is best addressed by the EU for other reasons (a sense of responsibility, a desire for urgent action, etc.). One example of when the EU might act out of a sense of responsibility, rather than distrust, is when it invokes 'subjective' extraterritoriality in the regulation of live animal exports, for the purposes of protecting their welfare.¹⁵ In any case, it will be demonstrated that the EU's distrust in a third country does not always entail the extraterritoriality of EU law.

This paper is structured around the notion of external trust. Section 2 sets out the definition of trust and positions the paper in the context of previous studies on 'mutual' trust – also giving a mention to public international law. Section 3 presents evidence from CJEU case law which points in the direction of a lack of trust between the EU and third countries. The examples on which this section is based consider international agreements entered into by the EU, restrictive measures, the General Data Protection Regulation, and the Emission Trading Scheme. Section 4 presents the opposite perspective, namely evidence of trust and international comity in the fields of data protection, restrictive measures and competition law. Finally, it draws together all these trends to form a conclusion.

2. THE NOTION OF EXTERNAL TRUST

This section considers a legal perspective on trust in EU and international law only then to focus on non-legal definitions, which will in fact provide the working definition of trust for the purposes of this paper.

¹³ Since this statement is made in purely general and abstract terms, it does not consider how different conflict of law rules might then decide on the particular applicable law.

¹⁴ P.C.I.J. *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 44 (Dissenting Opinion by Weiss); see, also, A. Peters, *The Growth of International Law between Globalization and Great Power*, 8 *Austrian Rev. Int'l & Eur. L.* 109, 131 (2003): 'If sovereignty means independence from other states, it precludes legal authority of one state over the other and implies the legal equality of states.' Both Weiss and Peters are cited in C. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford: Oxford University Press 2019) 366.

¹⁵ See recital 1 of Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, and Article 1(2)(a).

2.1. Trust in EU and international law

According to the Court of Justice of the European Union (CJEU), mutual trust is a structural principle of European Union (EU) law. It 'requires, particularly with regard to the area of freedom, security and justice, each [EU Member State], save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.'¹⁶ This may be called 'horizontal' trust. It has received significant attention,¹⁷ as well as some criticism, in scholarly literature.¹⁸ This (horizontal) mutual trust is not limited to the area of freedom, security and justice (AFSJ) in its application but, rather, being a structural principle, it is to be applied to all areas of EU law. One example is the use of the concept of mutual recognition, which partially overlaps with 'mutual trust'.¹⁹

There are several dimensions of mutual trust. These include trust between the EU and its Member States (vertical trust), and trust between the Member States themselves (horizontal trust). Vertically, the Member States are required to trust the EU's ability and motivation in order to accept the primacy of EU law, whereas scrutinising the proportionality of the MS' measures often implies an element of distrust (of the Member States' motivations). In this sense, the duty of loyal cooperation, which appears in Article 4(3) TEU, is plausibly a legal

¹⁶ ECJ, Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, para. 191 and the cited case law.

¹⁷ A. Williams, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 *German Law Journal* 468-495; K. Lenaerts, 'La Vie après l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust' (2017) 54 *Common Market Law Review* 805; S. Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2(1) *European Papers* 75; P.J. Martín Rodríguez, 'La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia *Aranyosi y Căldăraru*' (2016) 55 *Revista de derecho Comunitario Europeo* 859; M. Schwarz, 'Let's Talk About Trust, baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 *European Law Journal* 124; I. Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"' (2013) 50 *Common Market Law Review* 383; K. Lenaerts and J.A. Gutiérrez-Fons, 'A Constitutional Perspective' in R. Schütze and T. Tridimas (eds.), *Oxford Principles of EU Law* (2019) 122; as well as the contributions in the special section 'Special Section – Mutual Recognition and Mutual Trust: Reinforcing EU Integration?' in (2016) 1(3) *European Papers* and (2017) 2(1) *European Papers*.

¹⁸ G. Vermeulen, 'Flaws and Contradictions in the Mutual Trust and Recognition Discourse. Casting a Shadow on the Legitimacy of EU Criminal Policymaking & Judicial Cooperation in Criminal Matters?' in N. Persak (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice* (Ashgate: Routledge 2014) 153; E. Xanthopoulos, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (2018) 55 *Common Market Law Review* 489, 500; C. Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) 25 *European Law Journal* 37; D. Kochenov, 'The Acquis and Its Principles. The Enforcement of the "Law" versus the Enforcement of "Values" in the EU in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford: Oxford University Press 2017) 26.

¹⁹ S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14(5) *Journal of European Public Policy* 762). Mutual recognition, as Schütze rightly notes, is not 'federalist'. R. Schütze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) 41(6) *European Law Review* 826.

manifestation of trust (and of the closely related concept of loyalty).²⁰ Horizontally, the interaction arises when a Member State has to trust the behaviour of another Member State in relation to an individual (not in relation to the first Member State), but this does not change the fact that trust is involved. Mutual trust consists of a set of presumptions that are hard to rebut, including reliance on the fact that the other Member States respect fundamental rights, such as the right to a fair trial, judicial independence, etc. The presence of a high level of mutual trust between the Member States is one of the distinctive characteristics of EU law:²¹ as discussed below, the fact that mutual trust makes the EU what it is can also be demonstrated by the fact that *externally* (with third countries) there is no mutual trust, and that generally sovereign states do not have recourse to this category. In fact, one of the reasons why the EU could not accede to the ECHR was precisely that this accession was liable to affect the mutual trust between the Member States. In *Opinion 2/13*, the Court made it clear that the ECHR would require a Member State to check that another Member State has observed fundamental rights, even in relationships governed by EU law. In such relationships, the Member States are obliged to trust each other. The presumption of compliance may, nonetheless, be rebutted. The trust that binds the Member States is not blind, as case law has made clear.²²

Trust is a concept that also features in international law.²³ However, it would be incorrect to attach direct legal significance to 'trust' in public international law. Instead, it forms the basis of alliances and collective systems more generally. Consider, for example, that treaty obligations are based on an expectation of compliance (that *pacta sunt servanda*)²⁴ – in other words, they are premised on the principle of good faith, which may, in turn, imply trust.

2.2. Trust: A Behavioural Definition

This article considers an innovative perspective: Is there 'external trust', i.e. between European Union institutions (and EU Member States) and third coun-

²⁰ See L. Lonardo, 'The Political Psychology of Vertical Trust between the European Union and the Member States' (2021) 48(3) *Legal Issues of Economic Integration* 236. In addition, although it is not related to extraterritoriality, consider Article 344 TFEU ('Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'). From that obligation in ECJ, in Case C-459/03 *Commission v. Ireland* ('*Mox Plant*') EU:C:2006:345, the Court clarified that Member States are obliged not to initiate international dispute settlement proceedings against each other in relation to the provisions of an international agreement falling under the jurisdiction of EU courts.

²¹ K. Lenaerts and J. A. Gutierrez Fons, 'A Constitutional Perspective' in R. Schutze and T. Tridimas (n 20).

²² See K. Lenaerts (n 20); E. Xanthopoulos (n 21); A. Willems (n 20).

²³ There is the International Trusteeship System, which was established under Chapters XII and XIII of the United Nations (UN) Charter. As Crawford explains, that system 'distinguished between two classes of trust territory: 'ordinary Trusteeships' under the authority of the UN General Assembly and 'strategic Trusteeships' under the authority of the UN Security Council' J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press 2007). This concept is not related to trust between states in their interaction, at least not in any generally accepted sense of the word.

²⁴ Article 26 Vienna Convention on the Law of Treaties.

tries? The focus will not so much be on the substantive analysis of legal issues (already dealt with by numerous scholars), but will fall outside the realm of the traditional legal enquiry. It aims to discuss the role that mutual trust plays and has played in shaping EU law and in its functioning. As mentioned, there has been longstanding recourse to non-legal phenomena to explain law.

With reference to the interaction between individuals, several definitions of trust have been proposed.²⁵ For the purposes of this chapter, it will be defined 'as refraining from taking precautions against an interaction partner, even when the other, due to opportunism or incompetence, could act in a way that might seem to justify precautions'.²⁶ Schematically, the reasons for distrusting someone may be 'other people's ability or their motivation'.²⁷ This behavioural definition leads to a broad understanding of the concept in EU law: (dis)trust can exist not only between Member States, but also between the Union and third countries. It is worth focusing on the notion of behavioural definition (in itself a concept derived from psychology): behaviourism was an influential school of thought proposing that 'we cannot make any scientific statements about what might be going on in our minds, and that introspection was unreliable. Rather, psychologists can only investigate the physical manifestations that we can observe in the form of behaviour'.²⁸ For the purposes of this paper, therefore, the definition of trust shall be seen as a mere description of behaviour – and not as describing, for example, a mental state of the EU institutions (which would in any case be impossible as EU institutions cannot have mental states, other than metaphorically).

The object of trust between the EU and third countries appears to be both ability and motivation: some actions by the EU may be explained by a lack of trust in the approach taken by third countries in terms of respecting, for example, the EU's human rights standards, as the next section will demonstrate. This does not mean that the EU is a suspicious international player. Quite the reverse: the EU is bound by a constitutional commitment to foster multilateralism²⁹ and a system built on compliance with principles of international law, including good faith.³⁰

²⁵ Just one example: N. Luhmann, *Trust and Power* (Hoboken, NJ, John Wiley & Sons 1979) 32, an actor willingly surmounts a deficit of information leading to uncertainty regarding the success of an operation.

²⁶ J. Elster, *Explaining Social Behaviour* (Cambridge: Cambridge University Press 2015) 335. Conversely, trust may be 'the mutual confidence that no party to an exchange will exploit another's vulnerability.'

²⁷ Ibid 336. Sociologists propose more analytical categories of trust, for example, in organisations, political systems, families, etc. B. Misztal, 'Trust and Cooperation: The Democratic Public Sphere' (2001) 37(4) *Journal of Sociology* 371, 372.

²⁸ J. Bolhuis and L.A. Giraldeau, 'The Study of Animal Behavior' in id (eds.), *The Behavior of Animals. Mechanisms, Function, and Evolution* (Hoboken, NJ, Blackwell Publishing 2005) 3.

²⁹ Article 21(2)(h) TEU.

³⁰ Article 21(2)(b) TEU.

3. LACK OF TRUST BETWEEN THE EU (OR ITS MEMBER STATES) AND THIRD COUNTRIES?

The ‘external dimension’ of mutual trust comes into play when the concept is applied between the EU or its Member States, on the one hand, and third countries, on the other.

One of the essential characteristics of the EU’s constitutional order is the existence of mutual trust between its Members.³¹ It follows that there is no such mutual trust between the EU and third countries as exists between the Member States themselves. The EU and its Member States are allowed (collectively or individually) to take precautions against the behaviour of third countries. This idea is illustrated in the Opinion of Advocate General Bot in 1/17, where he argued that ‘The adoption, [in a Treaty between the EU and a third State] of substantive and procedural rules on investments can be explained by the fact that the relations between those Parties are not based on mutual trust, contrary to the situation prevailing as regards the relations between Member States.’³² He then went on to distinguish inter se situations of the Member States (the factual circumstances giving rise to the judgment in *Achmea*)³³ from the relationship held by the EU with third countries, which is not based on the premise implying and justifying ‘the existence of mutual trust between the Member States that those values will be recognised.’ It seems that mutual trust is thus excluded due to the different nature of the interaction between the EU and third countries – as opposed to the special mutual trust that binds the EU Member States.

In general, sanctions are the quintessential example of extraterritoriality that arises from distrust, when these are applied as precautions against the behaviour of a third country. Restrictive measures – also referred to as ‘sanctions’ – consist, amongst other things, of trade and investment restrictions, travel prohibitions, or asset freezes, and they form a pivotal tool of EU foreign policy.³⁴ By adopting restrictive measures, the Union spreads its fundamental values and safeguards its interests in the international arena. Strategically, the EU adopts sanctions as a means to signal its position on a given issue, to coerce, or to contain the behaviour of third states or foreign entities.³⁵ Given their aim and their manner of functioning,³⁶ restrictive measures are an expression of the

³¹ ECJ, Opinion 2/13 para 167 and 168.

³² AG view on Opinion 1/17 *CETA* para 81.

³³ ECJ, Case C-284/16 *Slovak Republic v. Achmea* ECLI:EU:C:2018:158.

³⁴ I. Dreyer and J. Luengo-Cabrera ‘Introduction’ in id (eds.), *On Target? EU Sanctions as Security Policy Tools* (Paris: EUISS Report 2015) 7; J. Kreutz, ‘Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981-2004’ Paper no. 45/2005, Bonn International Center for Conversion (BICC).

³⁵ See F. Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the End of the Cold War* (ECPR Press 2011).

³⁶ The procedure for adopting EU sanctions consists of two steps. Firstly, the Council of the European Union adopts a decision having as its legal basis Article 29 TFEU. Secondly, it adopts a regulation – usually, but not exclusively, under Article 215 TFEU. See the comprehensive analysis by C. Beauchillon, ‘Opening Up the Horizon. The ECJ’s New Take on Country Sanctions’ (2018) 55 *Common Market Law Review* 387.

EU's politically sensitive decisions.³⁷ The extraterritoriality of restrictive measures is evident insofar as they usually contain a prohibition on EU natural or legal persons to engage in contractual relations with entities of a third country (thus, such sanctions regulate an event that might take place outside the EU's territory). From a purely formal perspective, it is nonetheless the case that restrictive measures 'apply' only within the territory of the EU. However, they do have some effect in third countries (and this is indeed their rationale): more will be discussed in this respect in the section below, with regard to the case of *Venezuela v. Council*.³⁸ Significantly, EU law – and international agreements in particular – may impose obligations to adopt restrictive measures. The General Court's decision in *Mugraby*,³⁹ upheld on appeal,⁴⁰ may be seen as supporting the statement 'damages can be claimed from the EU in respect of injuries that occurred as a result of the failure of the EU to adopt measures against the Republic of Lebanon on the basis of a human rights clause in the Association Agreement between the Community and the Republic of Lebanon'.⁴¹

As clearly illustrated by the CJEU in *Achmea*, mutual trust is one of the hallmarks of the autonomy of EU law and one of its distinctive features. Even when States mention trust, they are probably doing so based upon their interest,⁴² that is, they may misrepresent their position in order to *gain* trust. The very existence of international law entails rules restraining the behaviour of states: precautions taken out of distrust for the interaction partner. The numerous reciprocity rules,⁴³ including in investor-state disputes, are evidence of this.

If mutual trust is distinctive to EU law, it is suggested that the mutual trust that exists between the Member States and is not in place with regard to third countries is a justification for differential treatment between EU and non-EU countries. This is illustrated by the difference between *Achmea* and *CETA*. *Achmea* makes it clear that Member States may not, inter se, set up a dispute resolution system which, despite falling outside the judicial system of the Member States, does not apply EU law. In other words, had the BIT between the Netherlands and Slovakia been concluded so as to exclude the application of EU law (for example, if it had been phrased like CETA, allowing the tribunal only

³⁷ See G. Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13(4) *European Constitutional Law Review* 673; C. Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (2014) 51(3) *Common. Market Law Review* 869.

³⁸ ECJ 22 June 2021, Case C-872/19 P *Venezuela v. Council*.

³⁹ GC, Case T-292/09 *Muhamad Mugraby v. Council of the European Union* [2011] 2011 II-00255.

⁴⁰ ECJ, Case C-581/11 P *Muhamad Mugraby v. Council of the European Union* [2012] 2012-00000.

⁴¹ A. Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) *Europe and the World: A Law Review*.

⁴² Y. Xuetong, 'The Problem of Mutual Trust' (*The New York Times*, 15 November 2012). <https://www.nytimes.com/2012/11/16/opinion/the-problem-of-china-and-u-s-mutual-trust.html>

⁴³ In *USSC, Zschernig* 389 U.S. 429 (1968), the US Supreme Court invalidated an Oregon law establishing that foreign residents could inherit only if their country of origin would guarantee reciprocity. The law was motivated by Oregon's distrust for the Soviet States of Eastern Europe, the homelands of many of its immigrants. The Supreme Court struck down the law on the grounds that it consisted of undue interference in the US's conduct of its foreign affairs.

to examine EU law as a matter of fact), it would still be prohibited. However, what is prohibited between the EU Member States is not prohibited between the Member States and third countries, as clarified by CETA.

Another example of extraterritoriality – in the limited sense of regulatory extension suggested by Scott – consists of the EU's regulation of financial stability following the 2008 global financial crisis and the later Eurozone crisis at the beginning of the last decade. In those cases, the matters regulated at EU level did not directly impose obligations in another jurisdiction, but nevertheless affected the behaviour of institutions in third countries by means of 'equivalence clauses'. In particular, 'the Commission and ESMA may give permission for an institution based in a third country to provide the relevant financial service in the EU on the basis of its home-country rules, provided these have been assessed as equivalent to the EU rules.'⁴⁴ It will be recalled that, as explained in detail by Davies, these rules were designed to avoid any failures in a third country affecting the EU's financial stability.⁴⁵ the author of this chapter interprets this analysis as highlighting the EU's distrust in certain lax regulatory systems of financial services.

Similarly, the Emission Trading Scheme (ETS) establishes a system for trading greenhouse gas emission allowances within the Union but it affects some third countries and territories, which can be fully integrated into or linked to it,⁴⁶ this is either because the ETS applies to those countries, or because an agreement linking that country and the EU's trading schemes has been concluded. When the ETS was expanded to include the aviation sector,⁴⁷ the Air Transport Association of America challenged measures adopted in the UK to implement the EU legislation, which, it claimed, had been adopted in breach of the customary international law principle of refraining to adopt extraterritorial legislation. When the request for a preliminary ruling reached the CJEU, the Advocate General took the view that the instrument did not have extraterritorial effects,⁴⁸ whereas the ECJ merely stated that the customary rule of public international law prohibiting legislation with extraterritorial effects did not have 'the same degree of precision as a provision of an international agreement', and therefore left the final decision to the national court.⁴⁹ However, the proposed Carbon

⁴⁴ G. Davies (n 5) 158.

⁴⁵ Ibid 146-151. See further, on equivalence clauses, the chapter by Royero Ávila.

⁴⁶ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council

Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁴⁷ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

⁴⁸ ECJ, Case C-366/10, Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change, [2011] paras 145-149.

⁴⁹ Ibid para. 110.

Border Adjustment Emission (CBAM) Regulation,⁵⁰ designed to complement the ETS, applies to direct emissions of greenhouse gases from the production of goods (Article 3(3) proposed CBAM Regulation) up until their import into the customs territory of the Union, and therefore extends extraterritorially to countries when they do not effectively charge the ETS price on goods exported to the Union.

The General Data Protection Regulation (GDPR)⁵¹ also displays some of the features of what has been termed ‘territorial extension’. Pursuant to the GDPR, the Commission issues ‘adequacy decisions’ regarding the standard of protection in non-EU countries, to simplify flows of personal data. Any absence of the adequacy decision does not make the transfer of data in the relevant third country unlawful per se, but it makes it more difficult to justify. The GDPR thus illustrates the case of EU legislation with territorial extension as courts *in the EU* may take into account conduct (or indeed legislation) *abroad*. The Schrems saga is rather telling. In the *Schrems II* case,⁵² the ECJ scrutinised in detail the adequacy of the protection provided by the EU-US Privacy Shield (which is the ‘second’ adequacy decision adopted by the Commission, after the first had already been declared invalid by the Court in *Schrems*)⁵³. In order to verify its compliance with EU data protection standards, the Court considered in some detail US legislation on access to and use of personal data transferred under the EU-US Privacy Shield by US public authorities for national security, law enforcement and other public interest purposes. The Court concluded that US law did not offer sufficient guarantees, and declared the EU-US Privacy Shield invalid. The judgment can be seen as a concrete manifestation of the distrust inherent in the GDPR: due to the fact that (some) third countries fail to provide sufficient protection, the EU standard ought to be adopted.

Inevitably, the absence of mutual trust between the EU and (some) third countries impacts the Union’s external demeanour, if not the extraterritoriality of EU law. The lack of trust – in the abovementioned cases of sanctions against Ukraine – does not simply entail an obligation for the Council to refrain from targeting individuals involved in criminal proceedings unless their rights are respected in a third country (which is commendable); the lack of trust also results in the EU’s scrutiny of the judicial independence of the Ukrainian prosecutors. See, for example, the *LTTE* case, in which the GC held that as certain third states are not bound by requirements stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), or by the EU’s Charter of Fundamental Rights, the Council must verify and then indicate in its statement the details confirming that it has ascertained that those rights were

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism COM/2021/564 final.

⁵¹ Reg. 2016/679 ([2016] OJ L118/1).

⁵² ECJ, Case C-311/18 *Data Protection Commissioner v. Facebook Ireland and Schrems* ECLI:EU:C:2020:559.

⁵³ ECJ, Case C-362/14 *Maximillian Schrems v. Data Protection Commissioner Schrems* EU:C:2015:650.

respected in a manner equivalent to the protection guaranteed at EU level.⁵⁴ It is a projection of power that, admittedly, is difficult to avoid in the case of restrictive measures, if individuals' rights are to be protected. On the other hand, at least between individuals, the fact of not trusting may lead to the belief among third countries that the EU is itself not trustworthy.⁵⁵

While it may be acceptable for the EU to challenge the independence of prosecutors internally,⁵⁶ this may send out a paternalistic, if not downright imperialistic, message when done in a third country (however, it may be that the third country has agreed to this, e.g. in an international agreement concluded with the EU) if an EU institution found that a third country was in breach of international law (as the next step, would the EU order violations of a foreign law?).⁵⁷

4. TRUST BETWEEN THE EU AND THIRD COUNTRIES: A MATTER OF COMITY?

It may also be the case, in principle, that some form of trust exists between sovereign states, and also between the EU and third countries. Good faith is a general principle of international law, and it is reflected in the Vienna Convention on the Law of Treaties with regard to treaty execution and interpretation. Good faith is best defined with a negative description: it is the absence of ulterior or hidden motives other than those that are apparent. Arguably, hiding a motive is a sign of distrust or a precaution – in addition to being a clear reason for not being trustworthy. As far as the EU is concerned, Article 3(5) TEU, in establishing the principles that guide the EU's external action, affirms that the EU shall contribute to 'mutual respect among peoples'. Respect is not the same as trust, but it may offer a basis on which trust can be built. Finally, the CJEU is not unambiguous on the lack of trust between the EU and third countries, as demonstrated by the examples given below. As Mills has correctly noted, 'internal action by the EU has external effects, which should be viewed not merely as incidental but also as potentially instruments of external policy'.⁵⁸ Mills referred

⁵⁴ GC, Joined Cases T-208/11 and T-508/11 *Liberation Tigers of Tamil Eelam (LTTE) v. Council* para 138.

G. Harpaz, 'Common Foreign and Security Policy, Counter-Terrorism Measures and Judicial Review: Hamas and LTTE' [2018] *Common Market Law Review* 1917.

⁵⁵ Evidence that the trustworthy are those who trust others is contained in D. Glaeser, 'Measuring Trust' (2000) 15 *Quarterly Journal of Economics* 811.

⁵⁶ As it did for Germany in ECJ, Joined Cases C-508/18 and C-82/19 *PPU*, *OG* and *PI*.

⁵⁷ The complex relationship between the EU and the ECtHR is also significant in terms of the EU having its own standard of human rights protection. Article 52(3) of the Charter sets out, as the default rule, the equivalence between scope and meaning of the Charter rights corresponding to rights guaranteed by the ECHR. The fact that the EU autonomous standard may be preserved, however, is evident, as autonomous interpretation is actually permitted by Article 52(3) of the Charter, interpreted in light of the Charter's Explanations: equivalence cannot go so far as to adversely affect the autonomy of EU law. While this may be related in some way to (dis)trust, it has nothing to do with extraterritoriality.

⁵⁸ Alex Mills, 'Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?' (2016) 65 *International and Comparative Law Quarterly* 541. Similarly,

to the developments of private international law, regulated ‘internally’ at EU level and having repercussions on the EU’s external position: for example, this occurs when the EU uses private international law ‘as a means of projecting policies extraterritorially by limiting access to EU recognition unless a foreign law or judgment complies with certain standards’.⁵⁹ In this case, distrust for the third state advances the EU’s interests.

The prohibitions contained in EU competition law apply regardless of where the practice was formed or adopted, even though enforcement by the Commission has varied, leaving open the question of ‘quite how wide the EU’s interpretation of comity is’.⁶⁰ The general rule is that practices whose effects may be felt in EU markets justify the applicability of EU law.⁶¹

However, the *Intel* case may be an example of how, despite some ‘distrust’, this does not necessarily lead to greater extraterritoriality. In *Intel* the Court established important conditions limiting (private) extraterritorial enforcement of competition law. It clarified that EU competition law only takes account of the global conduct of a dominant company when it ‘adopts an anti-competitive strategy covering both the territory of the EU and third countries’ and ‘it is foreseeable that it will have an immediate and substantial effect on the EU market’.⁶²

In recent opinions by Advocates General, discussed below, there have been calls for the EU to respect principles of international comity. Such principles – at least in international law – cannot be classified as legal ones⁶³ and they have a multifaceted dimension that can be summarised in the behaviour required from courts to ‘fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of another sovereign state’s acts, and restrict themselves from issuing such judgments and orders when to do so would amount to an unjustifiable interference’.⁶⁴ There is a direct link with both extraterritoriality and trust: trust in another country (and its legal system) may motivate a legislator not to legislate (a court not to enforce its laws) extraterritorially, and this operation goes by the name of comity.

In *Glawischnig-Piesczek v. Facebook*,⁶⁵ an Austrian politician was the subject of a comment posted on Facebook whose content, under Austrian law, was considered to be illegal. The Austrian courts asked the ECJ whether EU law

P. García Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally’ [2018] *Common Market Law Review* 157.

⁵⁹ Mills (n 50) 543. See further, on private international law and the extraterritorial reach of EU law, the chapter by Benini.

⁶⁰ Monti, ‘The Global Reach of EU Competition Law’ in M. Cremona and J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 176, discussing examples of EU practice.

⁶¹ ECJ, Case C-413/14 *Intel* paras 43 and 45.

⁶² Kellerbauer, ‘Common Rules on Competition, Taxation and Approximation of Laws’ in Kellerbauer, Klamert, Tomkin (eds.), *Commentary* 995. See ECJ, Case C-413/14, *Intel* paras 49 and 50. See further, on the extraterritorial reach of EU competition law, the chapters by Agnolucci and Bergamaschi.

⁶³ T. Schulz and N. Ridi, ‘Comity in International Courts and Tribunals’ (2017) 50 *Cornell International Law Journal* 578.

⁶⁴ *Ibid.*

⁶⁵ ECJ, Case C-18/18 *Eva Glawischnig-Piesczek v. Facebook*.

allowed them to order Facebook to remove worldwide statements having identical wording and/or equivalent content to the illegal post. Of particular interest for the purposes of this discussion is the call for respect of the interest of ‘international comity’ in AG Szpunar’s Opinion in *Glawischnig-Piesczek v. Facebook*, suggesting that domestic courts should limit the effect of extraterritorial injunctions.⁶⁶ This is closer to reciprocity than to ‘trust’, but the AG still calls for fine-tuned and self-restrained behaviour. More specifically, the AG took the view that while international law does not preclude the courts from issuing injunctions having extraterritorial effects, ‘owing to the differences between, on the one hand, national laws and, on the other, the protection of the private life and personality rights provided for in those laws, and in order to respect the widely recognised fundamental rights’, a court of a Member State should adopt a self-limitation approach and not issue the injunction to remove the comment.⁶⁷ Instead, the AG suggested the Austrian court could ‘order that access to that information be disabled with the help of geo-blocking’.⁶⁸

The idea of trust in the motivation of third countries perhaps reaches its apex in the recent opinion delivered by Advocate General Hogan in *Venezuela v. Council*.⁶⁹ It is worth examining this opinion in some detail. The AG suggested that a third country may challenge EU measures in EU courts provided that they meet the requirements of Article 263, fourth paragraph TFEU. The Opinion contains interesting reflections on the role of the EU in international relations, a role which, in his reconstruction, should be based upon what can be termed ‘trust’. Principles of international comity entail sovereign states being able to sue in the courts of another sovereign.⁷⁰ Accordingly, the AG concludes, somewhat succinctly, that ‘it is clear that [Venezuela] is a legal person for the purposes of the fourth paragraph of Article 263 TFEU’.⁷¹ The reasoning could perhaps be clearer here: why the EU would be bound by or should follow principles of international comity is not specified in the opinion (it is merely stated that it is ‘appropriate’)⁷², but this position is a second appeal to international comity made by an AG, in addition to AG Szpunar’s opinion in case *Eva Glawischnig-Piesczek*.

Even though the ECJ did not mention comity (or trust), it reached the same conclusion as the AG. It allowed Venezuela to challenge restrictive measures adopted by the EU. The decision sends a strong signal that EU courts are open for third countries to challenge EU law, namely, to challenge the result of democratic deliberation. It places strong confidence in the EU judiciary, particularly in view of the fact that reciprocity may not necessarily be in place. However, trust is not a decisive consideration in the Court’s reasoning: the judgment is based on the need to respect the rule of law (ensuring the reviewability of EU acts) and thus to guarantee a remedial system against measures adopted by

⁶⁶ Ibid para. 100.

⁶⁷ AG Opinion para 100.

⁶⁸ Ibid.

⁶⁹ ECJ, Case C-872/19 P *Venezuela v. Council*

⁷⁰ AG Opinion, Case C-872/19 P *Venezuela v. Council* para. 65.

⁷¹ AG Opinion, Case C-872/19 P *Venezuela v. Council* para. 68.

⁷² Ibid para. 72.

EU institutions. What about extraterritoriality? The question as to whether EU restrictive measures have extraterritorial effect was contentious in this case, even though it was not, per se, decided by the ECJ. The issue was, more correctly, about whether the measures affected Venezuela *directly* (for the purposes of establishing standing under the fourth paragraph of Article 263 TFEU). The General Court had found that the challenged restrictive measure did not impose prohibitions on Venezuela and, at most, had only indirect effects on it. In fact, the measures ‘targeted’ the third country insofar as they prohibited natural or legal persons of a Member State from supplying the goods and services in question to companies based in Venezuela. Formally, the General Court held that the sanctions did not concern Venezuela directly but only indirectly (the General Court also distinguished the case from the precedent of *Almaz-Antey*,⁷³ where the applicant – a Russian company – was explicitly and specifically referred to in the sanctions; it also considered that a state is not merely an economic operator). The Advocate General voiced strong disagreement with this approach, which he referred to as ‘highly artificial and unduly formalistic’.⁷⁴ The AG reasoned, more convincingly, as follows: firstly, Venezuela is indeed included directly in the restrictive measures.⁷⁵ Secondly, the fact that *ratione loci* and *ratione personae* the restrictive measure only ‘applies’, for example, on the EU’s territory is of no relevance to the issue of direct concern: the sanctions clearly affect Venezuela’s legal situation (therefore, it could be said that the restrictive measures do not have extraterritorial effects, but have territorial extension).⁷⁶ This is also the case with generally applied restrictive measures, imposing obligations on persons and entities only defined abstractly.⁷⁷

5. CONCLUSION: THE IMPACT OF ‘TRUST’ ON THE EXTRATERRITORIAL APPLICATION OF EU LAW

The extraterritorial application of EU law might suggest a form of distrust in other states and their laws, particularly in terms of their respect of a certain standard considered by the EU to be fundamental, or in certain transnational situations which affect the EU’s interests so much as to be necessarily enforced or regulated even outside of the EU’s territory.

However, the notion of trust does not offer a precise analytical tool through which to assess the extraterritoriality of EU law. This is because ‘external trust’ may lead to both *more* and *less* extraterritoriality. These are situations where one or the other instance arises: more distrust leads to extraterritoriality in the case of restrictive measures but distrust may, on the other hand, lead to less extraterritoriality if comity prevails, for example in the case of restriction of (private) extraterritorial enforcement. Admittedly, the second of these circumstanc-

⁷³ GC, T-255/15 *Almaz-Antey*.

⁷⁴ ECJ, Case C-872/19 P *Venezuela v. Council* AG Opinion para 109.

⁷⁵ Articles 6 and 7 of the contested measure.

⁷⁶ ECJ, Case C-872/19 P *Venezuela v. Council* AG Opinion para 113.

⁷⁷ ECJ, Case C-872/19 P *Venezuela v. Council* AG Opinion footnote 86.

es – clear in US antitrust law – applies less to the EU, even though there might be a hint of it in the *Intel*⁷⁸ judgment and in opinions of the AGs, as a reflection of the fact that ‘the growth of comity has motivated a retrenchment of civil extraterritorial jurisdiction’.⁷⁹

Methodologically, there is perhaps still a valuable ‘lesson’ in abandoning – momentarily – legal tools in order to introduce new perspectives into the study of EU law. For example, the EU’s interests and values are probably more fitting as an explanation of extraterritorial application. However, ‘values’ affect trust: EU institutions select which countries or systems to trust, and this choice seems to be based upon shared values. All things considered, despite a healthy level of ‘external distrust’, the EU is ‘open and assertive’, which is precisely the ‘branding’ of the trade policy unveiled by the Commission in February 2021.⁸⁰

⁷⁸ ECJ, Case C-413/14 P *Intel v. Commission* [2017] ECLI:EU:C:2017:632

⁷⁹ ‘Developments in the Law: Extraterritoriality’ 124(5) *Harvard Law Review* 1226.

⁸⁰ ‘Commission sets course for an open, sustainable and assertive EU trade policy’: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644>.

A PRIVATE INTERNATIONAL LAW PERSPECTIVE ON THE EXTRATERRITORIAL REACH OF EU LAW: THE “DOCILE” ATTITUDE OF EU CONFLICT OF LAW RULES

Caterina Benini*

1. INTRODUCTION

The extraterritoriality of EU law, understood as the application of EU law triggered by factors other than the connection with the territory of the EU, has largely been analysed over the last decade by EU law experts¹ and global governance scholars.² On the other hand, very few private international law contributions have been devoted to this topic,³ revealing the difficulties that private international law scholarship has in grasping the phenomenon of extraterritoriality of EU law,⁴ here analysed in the meaning of extension of the reach of EU laws, which apply also to situations not geographically located in the EU.

This contribution provides some elements to fill this gap, with a view to bringing private international law back to the debating table. The paper is structured as follows. After providing a definition of the extraterritorial reach of EU law, the article focuses on the technique used by the EU legislator to bring situations that occur beyond EU borders into the scope of application of EU legislation (2). The rules that establish the extraterritorial reach of EU law perform a task that may appear similar to that of other rules found in the EU legal order, namely those governing conflicts of laws (3), which in turn calls for coordination between the two sets of rules (4).

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¹ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2014, 87; J. Scott, 'The New EU "Extraterritoriality"', 51 *Common Market Law Review* 2014, 1343; J. Scott, 'The Global Reach of EU Law', in J. Scott and M. Cremona (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 21; E. Fahey, *The Global Reach of EU Law* (London: Routledge 2017); P. Davies, 'Financial Stability and the Global Influence of EU Law', in J. Scott and M. Cremona (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 146.

² H.L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict', 57 *American Journal of Comparative Law* 2009, 631; H. Lindahl, *Fault Lines of Globalization* (Oxford: Oxford University Press 2013).

³ A recent private international law contribution on the topic has been provided by J. Basedow, *EU Private Law. Anatomy of a Growing Legal Order* (Cambridge: Intersentia 2021) 655 ff.

⁴ M. Szpunar, 'Territoriality of Union Law in the Era of Globalisation', in D. Petrálik, *et al.* (eds.), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský* (Bruxelles: Bruylant 2020), 154.

2. THE EXTRATERRITORIAL REACH OF EU LAW: THE NOTION AND THE LEGISLATIVE TECHNIQUE BEHIND IT

The extraterritorial reach of EU law can be defined as the circumstance where EU law applies not only to situations internal to the Union, but also to situations occurring outside the Union's territory. This occurs as a result of a peculiar legislative technique under which the EU legislator outlines the spatial scope of application of its own substantive laws in such a manner that situations located outside the EU fall under the reach of its laws.⁵ Therefore, the extraterritorial reach of EU law is based upon the adoption and operation of applicability rules through which EU substantive laws delimit their own spatial scope of application.⁶ This is the case, for instance, with regard to the General Data Protection Regulation,⁷ which, pursuant to Article 3, applies not only to the processing of personal data performed by a processor or controller established in the Member States,⁸ but also when the processor and/or the controller are located in a third state, and they process personal data of subjects which are in the Union where 'the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union'.⁹

The EU legislator enlarges the scope of application of its own laws to encompass within that scope events occurring beyond its territorial boundaries

⁵ S. Francq, 'The scope of secondary community law in the light of the methods of private international law – or the other way around?', 8 *Yearbook of Private International Law* 2006, at 338 writes that 'the territory of the Community corresponds to the limits of the binding force of Community law but does not determine the limits of its applicability, i.e. the delineation of the situations to which it is applicable'.

⁶ S. Francq, *supra* note 5, at 344 argues that criteria of applicability are generally spread throughout the legal instrument and can be found within the material provisions, the definitions, and the recitals. Besides Article 3 GDPR below analysed, other examples are: Article 1(2)(3) of Council Regulation (CE) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *OJ* [2004] L 24/1, 29.1.2004; Article 25(1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, *OJ* [2012] L 201/1, 27.7.2012; Article 24(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, *OJ* [2014] L 173/84, 12.6.2014; Article 28(1)(b) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, *OJ* [2012] L 86/1, 24.3.2012; Article 1(1)(d) and 1(2)(a) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation), *OJ* [2014] L 173/1, 12.6.2014; Article 71 of Directive 2014/59/EU of the European Parliament and of Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, *OJ* [2014] L 173/190, 12.6.2014.

⁷ EU Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), *OJ* [2016] L 119/1, 4.5.2016 (hereafter, the 'GDPR').

⁸ Article 3(1) GDPR.

⁹ Article 3(2) GDPR.

only if it is necessary for the pursuit of a specific EU policy goal.¹⁰ Hence, only non-EU situations which, despite being geographically located outside the Union, have, or may have, an impact on the European internal market or the European judicial space are encompassed in the scope of application of EU law.

Under the GDPR, for example, it is only when the data of subjects who are in the Union are processed in connection with the offering of goods or services within the Union or in relation to monitoring behaviours taken in the Union that the situation acquires some relevance under EU data protection legislation, even if the processor or controller of the data is not established in the EU. Even if the controller or processor is not based in the Union, they nevertheless process data relating to activities performed in the Union. Hence, the legislator considered it necessary to assimilate these cases to those where the controller and/or processor are based in the Union, to grant effective protection to data subjects domiciled in the Union¹¹ and to level the playing field in data protection for all companies operating in the European internal market.¹²

3. APPLICABILITY RULES TRIGGERING THE EXTRATERRITORIAL REACH OF EU LAW AND EU CONFLICT OF LAW RULES: A COMPETITIVE RELATIONSHIP

Applicability rules prescribing that EU substantive laws should apply to situations that are geographically located outside the EU do not operate in a vacuum.

Within the EU legal order,¹³ it is the task of conflict of law rules to identify the law applicable to situations having connections with several countries. The primary purpose of conflict of law rules is to identify the law applicable to an international relationship by allocating it to the country where the ‘seat’ of the

¹⁰ In Article 5(2) TEU there is a clear connection between EU competence and policy goals. As observed by G. Tesaurio *et al.*, *Manuale di diritto dell'Unione Europea* [Handbook of European Union Law] (Naples: Editoriale Scientifica 2018) at 44, competences are attributed to the EU to achieve specific goals; M. V. Benedettelli, ‘Connecting factors, principles of coordination between conflict systems, criteria of applicability: three different notions for a «European Community private international law»’ (2005) 3 *Il Diritto dell' Unione europea* 421, at 425 argues that community law has a functional nature; S. Francq, *supra* note 5, 364.

¹¹ This need is explicitly indicated in Recital 23 of the GDPR.

¹² P. Schumacher in D. Rücker, T. Kugler (eds.), *New European General Data Protection Regulation. A Practitioner's Guide. Ensuring Compliant Corporate Practice* (Baden-Baden: Nomos 2018) 38-39; L. Feiler, N. Forgó, M. Weigl, *The EU General Data Protection Regulation (GDPR): A Commentary* (Croydon: Globe Law and Business Ltd 2018) 16.

¹³ The Treaty of Amsterdam explicitly envisaged, for the very first time, the competence of the EC in private international law (Article 65 TEC, which, after Lisbon, became Article 81 TFEU). See, in this respect, G. R. de Groot and J. J. Kuipers, ‘The New Provisions on Private International Law in the Treaty of Lisbon’, 15 *Maastricht Journal of European and Comparative Law* 2008, 109-110; J. Meeusen, ‘Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution’, 9 *European Journal of Migration and Law* 2007, 287. According to Article 4(2)(j) TFEU, the EU's competence in this field is concurrent. As envisaged by Article 2(2) TFEU, EU Member States can adopt measures in fields of concurrent competence insofar as the specific matter has not been regulated by the EU.

relationship, meaning its barycentre, is located.¹⁴ By virtue of the connecting factors adopted under conflict of law rules, the adjudicator identifies the law applicable to each international case brought to his or her attention.¹⁵

Hence, when asked to determine the law applicable to an international situation pursuant to conflict of law rules, the judge bases his or her inquiry on the private relationship at stake, in relation to which the applicable law through the pertinent conflict of law rule is identified. The opposite applies when the judge is faced with an international case falling under the scope of application of EU substantive laws having extraterritorial reach. In this circumstance, the judge must commence his or her inquiry from the law itself, identifying the scope of application of the law, based on its explicit or implicit applicability rules.

Despite being included in different legal instruments, EU conflict of law rules and EU substantive law applicability rules are bound to interfere with each other, as they have a seemingly similar function, which is to determine whether a given law is to be applied to an international case. More precisely, EU substantive law applicability rules are concerned with the applicability of that specific piece of EU law to specific (intra or extra) EU situations, whereas EU conflict of law rules are concerned with the applicability of the law of a given country to an international situation.¹⁶

As both sets of rules are called into play when it is necessary to determine the applicability of a certain law to international situations, it is crucially important to clarify the relationship between them, so as to ascertain whether a judge dealing with an international situation falling under the scope of application of an EU substantive law having extraterritorial reach can apply the EU substantive law directly or whether he or she must firstly determine the governing law pursuant to EU conflict of law rules.¹⁷ One example related to the GDPR may help us to understand this problem.

A person who is in Italy provides his data to a controller established in a third state (for instance, Russia) for the performance of a contract whose subject consists precisely of the processing of his personal data (i.e. processing of his data in order to find new job offers for the data subject). The data subject complains that the controller has processed his data in a manner contrary to what

¹⁴ P. Gothot, 'Le renouveau de la tendance unilatéraliste en droit international privé', *Revue critique de droit international privé* 1971, 9.

¹⁵ EU conflict of law rules are largely based on the theory developed by Savigny in the eighth and final volume of his *System des heutigen römischen Rechts* published in 1849. For the English version, see F. C. von Savigny, *A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time*, translated with notes by William Guthrie (Edinburgh: T&T Clark Law Publishers 1869). On the influence of the Savignian theory over EU conflict rules, see M. Sonnentag, 'Friedrich Carl von Savigny', in J. Basedow, et al. (eds.), *Encyclopedia of Private International Law* (Cheltenham: Edward Elgar Publishing 2017), 1613; S. Francq, 'Unilatéralisme versus bilatéralisme: une opposition ontologique ou un débat dépassé? Quelques considérations de droit européen sur un couple en crise perpétuelle', in T. Azzi and O. Boskovic (eds.), *Quel avenir pour la théorie générale des conflits de lois ? Droit européen, droit conventionnel, droit commun* (Brussels: Bruylant 2015), 52. 58-59.

¹⁶ See, on this distinction, R. De Nova, 'Conflits des lois et normes fixant leur propre domaine d'application', in *Mélanges offerts à Jacques Maury* (Paris: Dalloz 1960), 395.

¹⁷ M. Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' 3 *European Data Protection Law Review* (2016) at 330 acknowledges that 'it is a conflict between two sets of rules that calls for a determination which set prevails'.

they had agreed in their contract, as he had received job offers in fields different from those agreed contractually. Assuming that a claim for damages is filed by the alleged victim before an Italian court, the following issue arises. Can the Italian judge apply the GDPR directly, pursuant to Article 3(2) GDPR? Or, given the cross-border nature of the situation, is the judge obliged to determine the law applicable to the situation pursuant to the applicable conflict of law rules?

If the conflict of law route is followed, the relationship would firstly need to be characterised. As the controller was obliged to process the data in the manner envisaged by the contract for the provision of the service, which consisted precisely of processing the data, the dispute could be qualified as contractual. This would trigger the applicability of the Rome I Regulation on the law applicable to contractual obligations.¹⁸ In the absence of any agreement on law applicable by the parties, pursuant to Article 4(1)(b) Rome I Regulation, the contract for the provision of services will be governed by the law of the country where the service provider has his habitual residence. In this case, this would be the law of the country where the controller is established, namely Russia.

The application of Russian law, and consequently the non-application of the GDPR in a case concerning the processing of the data of a person based in the Union, collides with the policy goals beneath the GDPR. This result could be avoided through the direct application of the GDPR based on Article 3 of the Regulation. It is unclear, however, how EU substantive law applicability rules, such as Article 3 GDPR, can technically take precedence over EU conflict rules. It is not stated anywhere in the GDPR that the rules on its spatial scope of application should take precedence over general EU conflict of law rules,¹⁹ which are binding upon EU authorities. This means that, unless otherwise envisaged, EU authorities must apply EU conflict rules when determining the law applicable to a cross-border case. Given that the direct application of the GDPR to the case identified in this example amounts to a *non-application* of EU conflict rules, a justification must be provided for this, if the prevalence of EU substantive law applicability rules over EU conflict rules is not to violate the mandatory nature of EU (conflict) law.

4. MECHANISMS OF COORDINATION

No assistance is offered by the primacy of EU law in coordinating (a) EU substantive laws applicability rules and (b) EU conflict of law rules. Indeed, as both types of rules belong to secondary EU law, the primacy of EU law cannot justify the prevalence of the former type over the latter.

¹⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ [2008] L 177/7, 4.7.2008.

¹⁹ Such a rule of coordination is, on the contrary, enshrined for rules on international jurisdiction in Recital (147) GDPR, which provides that ‘Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council should not prejudice the application of such specific rules’.

It is more useful to analyse whether some mechanisms that are generally used to coordinate substantive rules and conflict of law rules can be of any help in justifying the prevalence of rules triggering the extraterritorial reach of EU law over EU conflict of law rules.

4.1. Overriding mandatory rules

An initial mechanism is represented by the category of overriding mandatory rules. These are 'the provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable'²⁰ under the pertinent conflict of law rules. An overriding mandatory rule is, in essence, a substantive provision which applies directly, without interference from conflict of law rules. Two cumulative requirements must be satisfied for a substantive rule to be qualified as an overriding mandatory rule.

Firstly, the provision should be considered by the enacting state as crucial for the protection of a public interest, such as the political, social, and economic structure of a country. This public interest criterion has two prongs.²¹ The first prong is subjective in nature, in the sense that it is based on a determination by the enacting state that the provision in question is crucial for the community it governs. The second prong is objective and requires an assessment as to whether the provision pursues a public interest.

Secondly, to be qualified as an overriding mandatory rule, the substantive rule must be intended to apply to any situation within its own scope of application, irrespective of the law otherwise applicable pursuant to conflict of law rules.²² This means that the rule must outline its own scope of application, within which it is to be applied, to the exclusion of any other law. The overriding reach of a rule may be clearly identified in the provision or in another rule having the purpose of defining its scope; if it is not clearly indicated, the adjudicator can deduce it from the content and objectives of the rule.²³

Only when both the public interest and the overriding criterion are met can a national rule be qualified as an overriding mandatory rule and be applied di-

²⁰ Article 9(1) of the Rome I Regulation. The majority of scholars also rely on this definition for the Rome II Regulation. G. Biagioni, 'Art. 9', in F. Salerno and P. Franzina (eds.), 'Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali ("Roma I")', 3-4 *Nuovi leggi civili commentate* 2009, 789-790; M. Schmidt-Kessel, 'Article 9: Overriding Mandatory Rules', in F. Ferrari (ed.), *Rome I Regulation: Pocket Commentary* (Munich: Sellier 2015), 325.

²¹ A. Fuchs, 'Article 16: Overriding Mandatory Rules', in P. Huber (ed.), *Rome II Regulation: Pocket Commentary* (Munich: Sellier 2011), 355.

²² A. Fuchs, *supra* note 21, 355.

²³ A. Bonomi, 'Article 9: Overriding Mandatory Provisions', in U. Magnus, P. Mankowski (eds.), *Rome I Regulation. Commentary* (Cologne: Otoschimdt 2017), 627-628.

rectly, exceptionally²⁴ avoiding the mediation of conflict rules.²⁵ When a rule only passes the public interest test, the private international law mechanism of the *ordre public* allows this rule to enter the stage through the back door.²⁶ When, on the contrary, the rule that defines its own scope of application has an overriding reach, but does not protect a public interest, neither the mechanism of the overriding mandatory rules nor the *ordre public* argument is of any assistance in its application.²⁷

The category of overriding mandatory rules does not solve the problem of coordination analysed throughout this paper. An applicability rule delimiting the scope of application of EU substantive law, such as Article 3 GDPR, cannot be considered, on its own, an overriding mandatory rule, since it is an instrumental provision which only delimits the scope of application of other substantive rules. Only provisions providing a substantive discipline can amount to overriding mandatory rules.

Furthermore, the reference to overriding mandatory *rules* is not accidental: only specific provisions included under broader substantive laws or regulations can be characterised as overriding mandatory rules. Hence, it is not possible to consider that a regulation, such as the GDPR, derogates EU conflict of law rules pursuant to the mechanism of overriding mandatory rules.²⁸ Rather, only *specific* substantive provisions of the GDPR which (i) are crucial for the protection of public interests and (ii) have an overriding reach can amount to overriding mandatory rules. If it could be said that any substantive law provision of the GDPR has an overriding reach pursuant to Article 3 of the Regulation,²⁹ which, as said above, requires the application of the GDPR to non-EU situations

²⁴ This is explicitly highlighted in Recital (37) of the Rome I Regulation. According to A. Bonomi, *supra* note 23, at 618: ‘the definition, which is formulated in terms that are deliberately restrictive, should also have a *dissuasive effect* for the Member States [...]. This should prevent a too frequent derogation from the uniform choice-of-law rules of the Regulation by means of excessive recourse to Art. 9’.

²⁵ With regard to the fact that such rules apply immediately, without the intermediation of conflict-of-law rules, see P. Francescakis, ‘Quelques précisions sur les «lois d’application immédiate» et leurs rapports avec les règles de conflits de lois’, 55 *Revue critique de droit international privé* 1966, 4. See, also, M. P. Weller and A. Schulz, ‘How European are Overriding Mandatory Provisions and Public Policy Exceptions?’, in J. von Hein, *et al.* (eds.), *How European is European Private International Law? Sources, Court Practice, Academic Discourse* (Cambridge: Intersentia 2019), 296.

²⁶ The public policy exception is described in the same terms under Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation: ‘The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum’.

²⁷ M. Melcher, ‘Substantive EU Regulations as Overriding Mandatory Rules?’, 1 *ELTE Law Journal* 2020, 42; see, also, P. Kinsch, ‘L’autolimitation implicite des normes de droit privé matériel’ 92 *Revue critique de droit international privé* 2003, 407, where he points out that self-limited norms (*norms autolimitées*) and overriding mandatory rules (*lois d’application immédiate*) are two different types of rules and should not be confused.

²⁸ M. Melcher, *supra* note 27, 39-40; B. Steinrötter, ‘Kollisionsrechtliche Bewertung der Datenschutzrichtlinien von IT-Dienstleistern Uneinheitliche Spruchpraxis oder bloßes Scheingefecht?’ 16 *Multimedia und Recht* 2013, 691.

²⁹ M. Melcher, *supra* note 27, at 42 where she argues that a broad territorial scope of application ‘often hints at an internationally mandatory character’.

irrespective of the law applicable to them, it is debatable whether some GDPR substantive law provisions, which protect data subjects from unlawful processing of personal data, can be considered as underpinned by public interests.

Be that as it may, the mechanism of overriding mandatory rules does not appear to provide a feasible solution to the problem of coordination between EU conflict rules, on one hand, and EU substantive laws applicability rules, on the other. Indeed, under the mechanism of overriding mandatory rules, courts and legislators are concerned with the applicability of a specific substantive provision to an international case, and not with the systemic question of whether EU substantive law applicability rules take precedence over EU conflict of law rules. Put it otherwise, the mechanism of overriding mandatory rules, which has been devised to allow courts to directly apply a rule which they deem vested with public relevance, is inadequate to solve a question of coordination which cannot accept a case-by-case based solution.³⁰

4.2. **Prevalence of applicability rules of EU substantive laws over EU conflict of law rules**

Having excluded that the category of overriding mandatory rules can solve the problem at stake, the prevalence of EU substantive law applicability rules and, through them, of the EU substantive regime over EU conflict of law rules may be based upon other mechanisms.

The speciality principle as enshrined in the Rome Regulations

According to a line of reasoning,³¹ the interpreter should solve the conflict between rules unilaterally defining the scope of application of EU law and EU conflict rules by relying on Article 23 of the Rome I Regulation and Article 27 of the Rome II Regulation.³²

Pursuant to these provisions, the general conflict rules contained in the Rome Regulations should be superseded by the conflict rules contained in more specific EU legal instruments dealing with contractual and non-contractual issues. The underlying assumption is that the conflict rules contained in sector-specific instruments reflect the needs of these fields more closely than the conflict rules of the Rome Regulations. To supersede the general conflict provisions of the Rome Regulations, rules must cumulatively meet the following requirements: (i) the EU law instrument – or the national legislation transposing the directive – in which such rules are included must deal with particular matters; (ii) the rules

³⁰ M. Melcher, *supra* note 27, at 42 refers to the very broad scope of interpretation left to courts and legislators when the mechanism of overriding mandatory rules is put into action.

³¹ P. Mankowski, *Entwicklungen im International Privat- und Prozessrecht für Transportverträge in Abkommen und speziellen EG-Verordnungen*, 5 *Transportrecht* 2008, 180. In favour of this view, M. Melcher, *supra* note 27, 45.

³² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ [2007] L 199/40, 31.7.2007.

in question must be conflict of law rules; and (iii) they must relate to contractual or non-contractual obligations.

It is a matter of dispute as to whether applicability rules of EU substantive laws claiming their own application over international situation, such as Article 3 GDPR, can be qualified as conflict of law rules. The Rome Regulations do not define “conflict of law rules” for the purposes of Article 23 and Article 27. It is generally agreed that this notion should be seen in a functional and material sense, encompassing rules deciding ‘which of several possible legal regimes for particular matters of contractual relations govern certain cases’.³³

When considering the nature and function of rules determining the spatial reach of EU law, on one hand, and conflict of law rules, on the other, it is unlikely that the former rules will be classified as belonging to the same category as the latter rules. As to their nature, conflict of law rules are part of private international law, namely the branch of law that is only involved by relationships having a connection with two or more legal orders, whereas rules determining the reach of EU substantive law apply irrespective of the international or domestic nature of the relationship concerned. As to their function, the purpose of conflict of law rules is to coordinate the legal orders with which a private international relationship is connected, by identifying the country whose law should govern the case, whereas rules defining the scope of EU substantive law determine the spatial reach of the latter, without determining which law should be applied to a cross-border case.

In light of these differences, the classification of rules on the spatial application of EU law as conflict of law rules appears implausible, and Articles 23 and 27 of the Rome Regulations do not assist in coordinating the rules in question.

The speciality principle as a general rule

Rather than seeking to compress EU substantive law applicability rules into the category of conflict of law rules, a second approach suggests that the dilemma can be solved by resorting to the speciality principle (*lex specialis derogat (legi) generali*). Given the more limited scope of application of EU substantive law and its more specific market-centric goals as opposed to the broad objectives of EU conflict of law rules, when dealing with any matter of private law having cross-border implications, EU substantive law – and the rules defining its territorial scope of application – should prevail over general conflict rules.

This approach, however appealing it may be for its simplicity, is unpersuasive.

Legally speaking, a rule is “special” when it contains all the elements of the general rule in addition to specialising elements. When two rules appear to be relevant to the same issue, the special rule is applied in place of the general one in order to avoid any dual regulation of the same matter. Hence, the interpreter proceeds to apply the special rule only, given that the goal and function of the general rule are absorbed and fulfilled by the former.

This coordination mechanism may work smoothly for rules positioned at the same level and having the same function. However, it is questionable whether

³³ S. Omlor, ‘Article 23: Relationship with other provisions of Community law’ in F. Ferrari (ed), *Rome I Regulation: Pocket Commentary* (Sellier 2015) 499, 500.

it can be applied for regulating the relationship between rules belonging to different categories and underpinned by different logics.

If rule A (the alleged special rule) does not contain all the elements of rule B (the alleged general rule), not only is it difficult to justify why rule A should override rule B, but it is also necessary to apply rule B in any case, the function of which is neither superseded nor absorbed by rule A. Therefore, if, as explained above, rules triggering the extraterritorial reach of EU law and conflict of law rules have a different nature and function, the speciality principle does not assist with their coordination.

The docile attitude of EU conflict of law rules

Taking it as read that EU substantive law applicability rules differ in their nature and function from conflict of law rules, an orderly interaction between these types of rules is assisted by what can be described as the “docile” attitude of EU conflict of law rules. By virtue of this attitude, EU conflict of law rules do not claim to be the exclusive tool through which the law applicable to cross-border relationships is determined. Rather, they are ready to make way for other mechanisms through which to identify the applicable law when relevant reasons so require.³⁴

As seen above, under the mechanism of overriding mandatory rules, such relevant reasons are the politically sensitive interests which justify the direct application of certain substantive rules, without interference from conflict of law rules.

With respect to EU substantive law applicability rules, the need to foster legal certainty through the direct application of the legal regime adopted under the EU substantive law is a pertinent reason for which conflict rules should take a step back. As EU substantive law instruments are adopted to increase legal certainty with respect to the content of the law applicable to private relationships and to eliminate the diversity of substantive laws through uniform rules, this goal would not be achieved if conflict rules were to be applied to determine if the uniform law instrument governs the relationship. In other words, uniform substantive laws, such as those adopted by the EU, would be severely disrupted in their objectives and *effet utile* if conflict rules were to be regularly applied to determine the governing law.

³⁴ This argument echoes the one suggested for the coordination between conflict of law rules and applicability rules of international uniform conventions. See, on this, K. Boele-Woelki, ‘Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws’, 340 *Recueil des cours* 2009, 397 et seq.; A. V.M. Struycken, ‘Coordination and Co-operation in Respectful Disagreement. General Course on Private International Law’, 311 *Recueil des cours* 2004, 112-113; A. Malintoppi, ‘Les rapports entre droit uniforme’, 116 *Recueil des cours* 1965, 25 et seq.; A. Malintoppi, *Diritto uniforme e diritto internazionale privato in tema di trasporto* [Uniform and Private International Law in Transport Matters] (Milan: Giuffrè 1955), 37 et seq. Since however the problem of coordination between EU conflict rules and EU substantive law applicability rules occurs within the EU legal order, the solution suggested in this paper is inevitably featured by arguments of EU law, such as the teleological and the *effet utile* interpretation.

This means that when EU substantive rules contain provisions defining their scope of application, such as Article 3 GDPR, conflict rules should take a step back in favour of the applicability rules which mandate the application of EU uniform substantive laws to international situations. The pursuit of the goals underpinning the GDPR makes it appropriate for conflict of law rules to give precedence to provisions prescribing the scope of application of the GDPR and to the substantive regime provided under that regulation.

It may be the case, however, that EU uniform substantive laws are not equipped with rules defining their scope of application. This occurs, for instance, in the case of Directive 2011/7/EU on combating late payment in commercial transactions,³⁵ which applies to ‘all payments made as remuneration for commercial transactions’,³⁶ without specifying, for instance, whether it applies only to transactions entered into by at least one EU commercial entity. Hence, if a creditor complains that its debtor has not paid the amount due under an international contract, the interpreter must resort to conflict of law rules to identify the law applicable to the contract. If, pursuant to the conflict rules, the law of a Member State is to be applied, the law of that country, including the law through which the State has implemented Directive 2011/7, will apply to the case in question.

This demonstrates that uniform substantive rules, such as those adopted by the EU, do not justify – in themselves – the setting aside of traditional conflict of law rules. Rather, conflict rules preserve their paramount coordinating function in all cases where uniform substantive laws do not define their spatial reach. However, it is clear that the widespread use by the EU legislator of the technique of unilaterally defining the scope of application of EU substantive laws has an impact on EU conflict of law rules, whose crucial role remains only in subject matters on which the EU legislator has not adopted uniform substantive laws equipped with rules defining their spatial scope of application.

5. CONCLUDING REMARKS

In conclusion, private international law, and, in particular, EU conflict of law rules are implicated in the extraterritoriality of EU law. Since the rules which trigger the extraterritorial reach of EU laws are in functional competition with EU conflict of law rules, it is important to identify mechanisms of coordination between these two types of rules, allowing EU substantive law applicability rules to be applied without interference from EU conflict of law rules.

As noted above, coordination is ensured by the flexible attitude of EU conflict of law rules, which do not claim to be the exclusive tool through which to determine the regime governing international situations. This is because EU conflict of law rules adapt their functioning to the needs of other EU substantive rules and to their underlying goals, either stepping back in favour of uniform substan-

³⁵ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, *OJ* [2011] L 48/1, 23.2.2011.

³⁶ Article 1 of Directive 2011/7/EU.

tive rules which already define their scope of application or complementing uniform rules which do not limit their ambit.

Whether the “docility” of EU conflict of law rules is the result of a political choice by the EU legislator or is the reflection of a natural feature of conflict of law rules is an aspect falling outside the scope of this article. It is important to emphasise here, in conclusion, that for EU laws to have an effective extraterritorial reach, it is crucial for conflict of law rules to take a step back in favour of the application of these EU unilaterally self-limited laws. This is vital as, without this, there would be a risk of a conflict arising between these two types of EU rules, to the detriment of the coherence of the EU legal order. It is therefore advisable for the relationship between EU substantive laws mandating their extraterritorial reach and EU conflict rules to be studied and analysed in further depth, with a view to ensuring that the policy goals involving EU substantive law being applied to non-EU situations can be achieved.

THE EXTRATERRITORIAL REACH OF EU SUBSTANTIVE CRIMINAL LAW: HOW EU HARMONISATION MEASURES STRETCH THE MEMBER STATES' CRIMINAL JURISDICTION

Lorenzo Grossio*

1. INTRODUCTION: SCOPE AND AIM OF THE RESEARCH

In the aftermath of the latest Treaty reforms, the European Union now has well-defined legislative competence on substantive criminal law. In fact, Article 83 TFEU confers on the Union's legislature the power to harmonise the definition of criminal offences and sanctions in some 'areas of particularly serious crime with a cross-border dimension',¹ as well as where such approximation is 'essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation'.²

In addition, the same Treaty provision confers on the EU the implicit power to lay down minimum rules on Member States' criminal jurisdiction for the prosecution of harmonised offences. This aspect is likely to raise a number of issues concerning extraterritoriality, defined herein as the extension of Member States' criminal jurisdiction to offences committed in third states. This concept does not include situations where national authorities exert jurisdiction over offences committed in another Member State, which involve a separate form of extraterritoriality, confined within the Union's external borders. The theorisation and scope of extraterritorial criminal jurisdiction established under EU secondary law provisions are elusive to define. Furthermore, the peculiar relationship between the Union and the Member States in this domain is largely unexplored in literature. In fact, academic research on the extraterritorial application of EU law has mainly concentrated on the externalisation of EU internal policies and on the reach of the Union's regulatory power,³ whereas the extraterritorial reach of Member States' criminal jurisdiction harmonised by the Union's legislature has been neglected by doctrine for some time.⁴

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¹ Art. 83(1) TFEU.

² Ibid., Art. 83(2).

³ For some references: A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press 2020); M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019); L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules', 9 *Journal of European Competition Law & Practice* 2018, 487-495.

⁴ J. Vervaele, 'European Criminal Justice in the European and Global Context', 10 *New Journal of European Criminal Law* 2019, at 13.

In aiming to bridge this gap, this paper demonstrates how EU harmonisation measures stretch Member States' criminal jurisdiction beyond the Union's external borders. With this aim, the article concentrates on the provisions enshrined in all AFSJ substantive criminal law directives and framework decisions currently in force. These cover a wide range of crimes, including, for instance, terrorism,⁵ human trafficking,⁶ sexual abuse and exploitation of minors,⁷ money-laundering,⁸ market abuse,⁹ fraud against the Union's financial interests¹⁰ and organised crime.¹¹ Against this background, the analysis addresses two main research objectives. Firstly, the paper offers a conceptual reconstruction of the phenomenon in question, with a view to providing a comprehensive theorisation of extraterritoriality in EU substantive criminal law (section 2). In this respect, it is suggested that EU law entails prescriptive assertions of extraterritorial jurisdiction (section 2.1), thus leading Member States to act both in the name of the Union and in their own interest when exerting extraterritorial enforcement and adjudicative jurisdiction (section 2.2). The paper then analyses the criteria used by the EU legislature to stretch Member States' criminal jurisdiction beyond the EU's external borders (section 2.3) in light of Scott's taxonomy, with a view to highlighting the emerging trends (section 2.4).

Secondly, the paper assesses the actual reach of extraterritorial jurisdiction under EU substantive criminal law instruments. In this regard, it is suggested that post-Lisbon penal directives have expanded the scope of extraterritorial prosecution compared to both international crime control treaties (section 3.1) and pre-Lisbon framework decisions (section 3.2). Nevertheless, the paper argues that conflicts of jurisdiction between Member States and third states could curtail the actual reach of extraterritorial criminal jurisdiction, thus suggesting a requirement for further research on this topic (section 4). The final section of this paper (section 5) provides some concluding remarks.

⁵ Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* [2017] L 88/6, 31.3.2017.

⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ* [2011] L 101/1, 15.4.2011.

⁷ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ* [2011] L 335/1, 19.12.2011.

⁸ Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *OJ* [2018] L 284/22, 12.11.2018.

⁹ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive), *OJ* [2014] L 173/179, 12.6.2014.

¹⁰ Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ* [2017] L 198/29, 28.7.2017.

¹¹ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ* [2008] L 300/42, 11.11.2008.

2. A THEORETICAL SYSTEMATISATION OF EXTRATERRITORIALITY IN EU SUBSTANTIVE CRIMINAL LAW

The theoretical assessment of extraterritoriality in EU substantive criminal law proposed here focuses on three different profiles. Firstly, the classical distinction between prescriptive, adjudicative and enforcement jurisdiction derived from international law will be considered, thus allowing for the concept of extraterritorial criminal jurisdiction in the EU context to be defined (section 2.1). Secondly, the relationship between the EU legislature and the Member States in asserting extraterritorial jurisdiction will be investigated (section 2.2). Using an overview of all EU secondary law provisions compelling Member States to establish extraterritorial criminal jurisdiction (section 2.3), the issue will be then discussed from the perspective of the general discourse on the extraterritorial application of EU law, with particular reference to Scott's taxonomy (section 2.4).

2.1. What is extraterritorial criminal jurisdiction in EU substantive criminal law?

From the outset, the first question to be addressed is: what do we mean by 'extraterritorial jurisdiction' in EU substantive criminal matters? The analysed notion is closely linked to the definition of jurisdiction,¹² which is not a monolithic concept. Indeed, the latter is traditionally conceived as a three-fold phenomenon, entailing prescriptive, adjudicative and enforcement aspects.¹³ The first consists of the sovereign power to 'state the law', thus defining criminal offences and making them apply to a defined group of persons. This concept can be linked to the legislative power of the State, which is precisely why it is also known as 'legislative jurisdiction'.¹⁴ Secondly, adjudicative jurisdiction enshrines the power of national judicial authorities to rule upon and resolve disputes.¹⁵ Finally, enforcement jurisdiction deals with the capability of State authorities to demand compliance with their laws.¹⁶

This distinction is crucially important in understanding the tripartite notion of jurisdiction and the relationship between the EU and the Member States in the criminal domain. In fact, the harmonisation of national criminal jurisdiction is essentially regarded as an exercise in prescriptive jurisdiction. In that respect, the EU legislature represents the main player, having the power to define the offences and, most importantly, to make them enforceable upon a defined range

¹² A. J. Colangelo, 'What is Extraterritorial Jurisdiction?', 99 *Cornell Law Review* 2014, at 1305.

¹³ Ibid., at 1310. See also: C. Ryngaert, 'The Concept of Jurisdiction in International Law', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar Publishing 2015), 50-75; C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press 2015).

¹⁴ A. J. Colangelo, *supra* note 12.

¹⁵ D. Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?', 13 *Melbourne Journal of International Law* 2012, at 125.

¹⁶ A. J. Colangelo, *supra* note 12.

of individuals by harmonising national criminal jurisdiction.¹⁷ Enforcement and adjudication are based on EU prescriptive assertions of jurisdiction but come into play at a later stage, in which only the Member States' authorities are involved.

With this relationship in mind, the boundaries of 'extraterritoriality' are still to be assessed. This notion is generally viewed negatively: jurisdiction is extraterritorial when it is asserted by a nation State over actions that did not occur within its borders.¹⁸ From this perspective, the very extent of extraterritorial prosecution depends largely on the opposite – and highly debated – concept of territoriality.¹⁹ While EU substantive criminal law provisions define territoriality as the exercise of jurisdiction over offences committed wholly or partly in a Member State's territory, there is currently no common understanding of the scope of territoriality in criminal law in States' practice. This uncertainty is due to the lack of a common understanding between States of the criteria governing the exercise of criminal jurisdiction. In fact, even in the EU context, fundamental penal concepts belonging to the so-called 'general part' of criminal law remain in the domain of national legislation and traditions.²⁰ As a result, some Member States – such as France – consider the prosecution of offences committed outside their territory, whose detrimental effects impact their domestic sphere, to be a form of territorial jurisdiction.²¹ In view of these varying concepts, this paper will use the constituent elements approach to define territorial jurisdiction, which appears to be agreed by almost all Member States.²² This concept of territoriality encompasses situations in which at least one of the constituent elements of the offence occurs within the territory of one or more Member States. Conversely, as already anticipated, extraterritorial jurisdiction covers the prosecution of offences committed entirely beyond the EU's external borders.

In an attempt to join the dots of the observations indicated above, it can be said that extraterritorial jurisdiction in EU substantive criminal law entails the EU legislature exercising prescriptive jurisdiction over offences whose constituent elements take place entirely within the territory of one or more third states. As the following sections will demonstrate, EU extraterritorial prescriptive juris-

¹⁷ Caeiro claims that 'it is now indisputable that the EU has a true, *albeit* limited, (prescriptive) jurisdiction in criminal matters', see P. Caeiro, 'Jurisdiction in Criminal Matters in the EU: Negative and Positive Conflicts, and Beyond', 93 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 2010, at 369.

¹⁸ D. Ireland-Piper, *supra* note 15, at 124.

¹⁹ Among the many: P. Szigeti, 'The Illusion of Territorial Jurisdiction', 52 *Texas International Law Journal* 2017, 369-400; C. Ryngaert, 'Territory in the Law of Jurisdiction: Imagining Alternatives', 47 *Netherlands Yearbook of International Law* 2017, 49-82.

²⁰ K. Nuotio, 'A Legitimacy-Based Approach to EU Criminal Law: Maybe We Are Getting There, After All', 11 *New Journal of European Criminal Law* 2020, 20-39.

²¹ C. Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law', 9 *International Criminal Law Review* 2009, 187-209, at 198.

²² See M. Böse *et al.*, 'Comparative Analysis', in M. Böse *et al.* (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis* (Baden Baden: Nomos Publishers 2013), 411-463, at 412-413. This approach is also known in international practice as the "objective territoriality principle": see International Law Commission, 'Report of the Work of the Fifty-Eighth Session' [2006] A/61/10, Annex V, para. 11.

diction consists of compulsory as well as optional grounds, both of which are of interest for the purposes of this analysis. These prescriptive claims then require the implementation of enforcement and adjudicative jurisdiction over the extraterritorial offences by the Member States' national authorities.

2.2. Is the nature of Member States' extraterritorial criminal jurisdiction original or derivative?

The above analysis has highlighted that extraterritorial jurisdiction in EU criminal law entails a connection between two levels, namely the EU and the Member States. While the Union's legislature holds a predominant position in asserting extraterritorial prescriptive jurisdiction, only national authorities have the means to exploit what we have referred to as enforcement and adjudicative jurisdiction. Against this background, it remains to be seen whether it is the EU or the individual Member States that are genuinely interested in fostering extraterritorial prosecution. If the EU as a single entity holds an interest in exercising extraterritorial prescriptive jurisdiction, do the Member States act in the name of the Union through enforcement and adjudicative assertions? Or, is it the opposite? Do they act in their own interests?

These questions allow us to draw a significant line of continuity from international law theoretical models to EU criminal law. Indeed, this issue can be understood more clearly by referring to the traditional dichotomy between primary and derivative jurisdiction. The latter distinction has emerged, in particular, in relation to the *aut dedere aut iudicare* principle. In fact, it may be the case that an offender attempts to evade justice by moving to a country holding no jurisdiction over the crime committed. In order to address such situations, many international crime control treaties (*i.e.* treaties envisaging obligations for the Contracting Parties to prosecute a specific range of behaviours) have introduced a choice for the receiving country via the *aut dedere aut iudicare* rule: to extradite the offender or to establish its own extraterritorial jurisdiction. If the country opts for the latter, its national authorities are not deemed to be acting in their own penal interest, but on behalf of the other country which has been unable to exercise its enforcement jurisdiction.²³ Thus, the prosecution of a crime in pursuance of a penal interest held by a different country is generally recognised as a form of vicarious or derivative jurisdiction. The exercise of enforcement and adjudicative jurisdiction based on the same country's prescriptive assertion is conversely known as original or primary.

This model can be generalised and applied to the relationship between the EU and its Member States. As the described dichotomy relates to the spheres of enforcement and adjudication, it could be argued that the Member States under EU substantive criminal law pursue a form of derivative extraterritorial jurisdiction. This concept appears to be consistent with the remarks made by

²³ M. Böse, 'EU Substantive Criminal Law and Jurisdiction Clauses: Claiming Jurisdiction to Fight Impunity?', in L. Marin and S. Montaldo (eds.), *The Fight against Impunity in EU Law* (Oxford, Hart Publishing 2020), 79-98, at 81.

Böse, according to whom there is a functional link between prescriptive and enforcement jurisdiction.²⁴ Thus, assuming that extraterritorial prescriptive assertions are in place for the Union's legislature, it could be argued that Member States' authorities prosecute EU-harmonised offences in the name of the Union's interest in criminalisation. Against this argument, it could be claimed that the EU is not a state but a *sui generis* international organisation. Nevertheless, it is undeniable now that the legislative competence on substantive criminal law enshrined in Article 83 TFEU allows the Union to develop its own criminal policy.²⁵ Therefore, since a political dimension of criminal law actually exists in the EU system, there is also a genuine interest by the Union in criminalisation. Although it may be partially convincing, the presented hypothesis is not entirely exhaustive for two main reasons. Firstly, it is worth noting that the Member States themselves hold a concurrent interest in criminalising the same offences. In fact, the vast majority of EU substantive criminal law instruments deal with actions that are already traditionally regarded as crimes by national law.²⁶ Secondly, Member States' governments are always involved within the Council in the ordinary legislative procedure for the adoption of substantive criminal law directives. Therefore, the political will of the Member States in terms of criminalisation makes a significant contribution to the development of EU criminal policy.

It appears, therefore, that, in the context of the extraterritoriality of EU substantive criminal law, there is some overlap between the original and derivative dimensions of jurisdiction. In fact, when exercising extraterritorial jurisdiction on the basis of EU criminal directives, national authorities act both in the own state's interest in prosecuting crime and also in pursuance of the EU criminal policy. This peculiarity is probably unique in the international law panorama and should be regarded as a corollary of the dual-layered constitutional structure of the European Union, as discussed above. Furthermore, this reconstruction demonstrates that a public international law theoretical model designed to underpin inter-state relationships (namely the dichotomy between original and derivative jurisdiction) can be applied by way of approximation to the interconnection between the EU and its Member States in the criminal law context.

²⁴ Ibid.

²⁵ In this regard see European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', (Communication) COM (2011) 573 final. See also: A. Klip, 'European Criminal Policy', 20 *European Journal of Crime, Criminal Law and Criminal Justice* 2012, 3-12. At the same time, scholars have pointed out that the development of a fully-fledged EU criminal policy is still in the early stages. Among the many: A. Weyembergh and I. Wiecezorek, 'Is There an EU Criminal Policy?', in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge: Cambridge University Press 2016), 29-47.

²⁶ On this point: R. Sicurella, 'EU Competence in Criminal Matters', in V. Mitsilegas *et al.* (eds.), *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar Publishing 2016), 49-77.

2.3. A categorisation of extraterritorial criminal jurisdiction in EU secondary law

Having assessed the notion and theoretical specificities of extraterritoriality in EU substantive criminal law, we will now take a closer look at the relevant legal framework, as defined in the introduction. In particular, this section will briefly introduce the criteria used by EU substantive criminal law instruments to trigger extraterritorial jurisdiction. These harmonising clauses enjoy a crucial role in stretching Member States' jurisdiction beyond the EU's external borders, as demonstrated by some examples from national implementing provisions provided below.

Territoriality is the traditional criterion that underpins criminal jurisdiction.²⁷ This clause – requiring Member States to prosecute harmonised offences committed within their territory – is included in all analysed secondary legislation. It is worth underlining that the EU legislature favours a broad definition of 'territoriality'. By way of example, the EU Counter-Terrorism Directive requires each Member State to establish its own jurisdiction over offences committed 'in whole or in part'²⁸ in its territory. This provision is reproduced in all analysed directives and framework decisions, thus demonstrating a consistent approach to the definition of territoriality.

EU law has surrounded territoriality with other harmonising criteria; some of them mandatory, others optional. Firstly, all analysed directives and framework decisions enshrine the active personality principle, thus requiring the prosecution of EU harmonised offences when the latter are committed by nationals of the Member States.²⁹ This constitutes an example of extraterritoriality: in fact, the offender's nationality is sufficient to establish criminal jurisdiction wherever the offence is committed. Some scholars have argued that the nationality principle could be 'symbolic of an evolution from narrow, self-interested territorial interests to a broader collective interest in the conduct of nationals overseas'.³⁰ In light of this, Arnell claims that nationality-based jurisdiction could play a wider role in the EU context, thus facilitating effective prosecution of international and transnational crimes.³¹ Indeed, this principle has played a significant role in stretching Member States' criminal jurisdiction. The Dutch implementing act of the Anti-Money Laundering Directive represents a clear example of this, as it introduced into domestic law a brand new nationality-based ground for the extraterritorial prosecution of this category of offences.³²

²⁷ C. Ryngaert, *supra* note 21.

²⁸ Art. 19(1)(a) Directive 2017/541/EU.

²⁹ To provide just one example, the Framework Decision on Organised Crime states that 'each Member State shall ensure that its jurisdiction covers at least the cases in which the offences [...] were committed: [...] (b) by one of its nationals (Art. 7(1)(b) Framework Decision 2008/841/JHA).

³⁰ D. Ireland-Piper, *supra* note 15, at 133.

³¹ P. Arnell, 'The Case for Nationality Based Jurisdiction', 50 *International and Comparative Law Quarterly* 2001, at 961.

³² Art. 1(A) Besluit van 8 juni 2020 tot wijziging van het Besluit internationale verplichtingen extraterritoriale rechtsmacht [Decision of 8 June 2020 amending the Decision on international obligations concerning extraterritorial jurisdiction], *Staatsblad* [2020] 163, 12.6.2020.

Secondly, EU criminal law instruments have extended the active personality principle to legal persons.³³ In fact, the EU legislature has in some cases required Member States to establish their jurisdiction where ‘the offence is committed for the benefit of a legal person established in [their] territory’. This criterion is present in the EU Counter-Terrorism Directive,³⁴ as well as the Framework Decisions on Organised Crime,³⁵ Ship-Source Pollution,³⁶ Corruption in the Private Sector,³⁷ Facilitation of Unauthorised Entry, Transit and Residence,³⁸ Drug-Trafficking,³⁹ Racism and Xenophobia.⁴⁰ The same provision has been included as an optional ground for exercising extraterritorial jurisdiction in the Directives on Trafficking in Human Beings,⁴¹ Sexual Abuse and Exploitation of Minors,⁴² Attacks against Information Systems,⁴³ Money-Laundering,⁴⁴ Fraud and Counterfeiting of Non-Cash Means of Payment,⁴⁵ Market Abuse,⁴⁶ and Fraud to the Union’s Financial Interests.⁴⁷ A number of Member States have modified their domestic criminal law provisions in order to comply with this particular harmonising criterion. Among the many, the Portuguese law on cybercrime is a key example in this regard.⁴⁸

Thirdly, the EU legislature has further extended the active personality principle to cases where the offender – although not a national – habitually resides

³³ M. Böse, *supra* note 16, at 87.

³⁴ Art. 19(1)(d) Directive 2017/541/EU.

³⁵ Art. 7(1)(c) Framework Decision 2008/841/JHA.

³⁶ Art. 7(1)(e) Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, *OJ* [2005] L 255/164, 30.9.2005.

³⁷ Art. 7(1)(c) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ* [2003] L 192/54, 31.7.2003.

³⁸ Art. 4(1)(c) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ* [2002] L 328/1, 5.12.2002.

³⁹ Art. 8(1)(c) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ* [2004] L 335/8, 11.11.2004.

⁴⁰ Art. 9(1)(c) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *OJ* [2008] L 328/55, 6.12.2008.

⁴¹ Art. 10(2)(b) Directive 2011/36/EU.

⁴² Art. 17(2)(b) Directive 2011/93/EU.

⁴³ Art. 12(3)(b) Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *OJ* [2013] L 218/8, 14.8.2008.

⁴⁴ Art. 10(2)(b) Directive 2018/1673/EU.

⁴⁵ Art. 12(3)(b) Directive 2019/713/EU of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *OJ* [2019] L 123/18, 18.5.2018.

⁴⁶ Art. 10(2)(b) Directive 2014/57/EU.

⁴⁷ Art. 11(3)(b) Directive 2017/1371/EU.

⁴⁸ Art. 27(1)(b) Lei n. 109/2009 do Cibercrime [Law n. 109/2009 on Cybercrime], *Diário da República* [2009] 179/6319, 15.9.2009. This law had been enacted in order to implement the pre-Lisbon Framework Decision on attacks against information systems which, similarly to the Directive currently in force, included a requirement to extend active personality to legal persons (Art. 10(2)(b) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, *OJ* [2005] L 69/67, 16.3.2005).

in the Member State concerned. The rationale of this particular feature of active personality can be explained by the high mobility rate of persons between the EU Member States.⁴⁹ In this regard, the considerable degree of proximity between offenders and their Member State of habitual residence could easily justify this extension of national criminal jurisdiction. This harmonising clause was introduced as a compelling obligation in the Counter-Terrorism Directive,⁵⁰ thus reproducing a similar jurisdictional rule included in the previous 2002 Framework Decision on the same topic.⁵¹ The innovative nature of the latter clause required Member States to adopt legislative provisions to extend criminal jurisdiction to terrorist offences committed by habitual residents, such as the statute adopted by the Irish legislature in 2005.⁵² Habitual residence is also an optional ground for extending criminal jurisdiction to offences committed outside the Member State's territory under all the other directives concerned (not in the pre-Lisbon framework decisions), with the only exclusion of the Directive on Counterfeiting the Euro.⁵³ Optional jurisdictional grounds such as the one in question may seem to lack concrete relevance, as Member States can extend their criminal jurisdiction on this basis even in the absence of similar secondary law provisions. Nevertheless, they are particularly indicative of the evolution of the EU legislature's approach towards extraterritoriality in criminal law, as will be demonstrated by section 3.2.

An additional ground for exercising criminal jurisdiction, namely the passive personality principle (or protective principle), is the fourth point to be considered. This criterion grants Member States the possibility of prosecuting offences committed outside their territory against one of their nationals or habitual residents.⁵⁴ Three AFSJ Directives contain such a provision – namely, Trafficking in Human Beings,⁵⁵ Sexual Abuse and Exploitation of Minors⁵⁶ and Fraud and Counterfeiting of Non-Cash Means of Payment⁵⁷ – as an optional ground. On its part, the Directive on Attacks against Information Systems requires Member States to extend their jurisdiction where an offence is committed against an information system established within a Member State's territory.⁵⁸ In a similar perspective,

⁴⁹ As demonstrated by data on intra-EU mobility: see Eurostat, 'People on the Move: Statistics and Mobility in Europe', (2020), available at: <<https://ec.europa.eu/eurostat/cache/digpub/eumove/>>; European Commission, 'Annual Report on Intra-EU Labour Mobility 2020', (2020) available at: <<https://ec.europa.eu/social/main.jsp?catId=738&langId=it&pubId=8369>>.

⁵⁰ Art. 19(1)(c) Directive 2017/541/EU.

⁵¹ Art. 9(1)(c) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ [2002] L 164/3, 22.6.2002.

⁵² Sections 6(2)(c) Criminal Justice (Terrorist Offences) Act 2005, [2005] 2, 8.3.2005.

⁵³ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, OJ [2014] L 151/1, 21.5.2014.

⁵⁴ On the evolution of the protective principle, see: M. B. Krizek, 'The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice', 6 *Boston University International Law Journal* 1988, 337-360.

⁵⁵ Art. 10(2)(a) Directive 2011/36/EU.

⁵⁶ Art. 17(2)(a) Directive 2011/93/EU.

⁵⁷ Art. 12(3)(c) Directive 2019/713/EU.

⁵⁸ Art. 12(2)(b) Directive 2013/40/EU.

the Counter-Terrorism Directive mandatorily requires jurisdiction to be established where the offences enshrined therein are committed against ‘the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State’.⁵⁹ Similarly to the extension of active personality to habitual residents, the latter manifestation of the protective principle had previously emerged within the repealed pre-Lisbon Framework Decision on Terrorism.⁶⁰ Member States’ implementing measures of this latter instrument – such as the Austrian measure⁶¹ – are evidence of the influence applied by the protective principle derived from EU law on national criminal systems.

Finally, some EU substantive criminal law instruments include the *aut dedere aut iudicare* principle. This ground is strictly linked to a traditional understanding of jurisdiction based on international criminal cooperation,⁶² as Member States are required to establish their jurisdiction over offences committed abroad by an individual if the latter is present within their territory and is not extradited. This applies, for instance, to the Framework Decision on Drug Trafficking⁶³ and the Directive on Counterfeiting the Euro.⁶⁴ Given the well-founded roots of the principle in question in international law practice, its inclusion in EU substantive criminal law instruments has a limited impact on Member States’ criminal systems.

It follows from this overview that the EU legislative approach towards extraterritorial criminal jurisdiction relies on a combination of different criteria, thus creating an elaborate patchwork summarised in Table 1 below. Despite this, the following analysis will demonstrate that a consistent EU approach towards extraterritoriality – together with a defined trend – actually emerges from this complex panorama.

2.4. EU criminal law in the general discourse on extraterritoriality

The assessment of harmonising provisions on criminal jurisdiction included in EU secondary law will be followed here by a brief reference to the taxonomies developed within the scholarly discourse on the extraterritoriality of EU law, with a view to complementing the proposed conceptual appraisal. In particular, this paragraph deals with Scott’s categorisation, which is one of the most well-known due to its generality.⁶⁵ This author distinguishes any manifestation of the extraterritorial application of EU law by creating three categories: extraterritorial jurisdiction in the strict sense, territorial extension and effects-based jurisdiction. While the first label includes situations where a measure does not enjoy a

⁵⁹ Art. 19(1)(e) Directive 2017/541/EU.

⁶⁰ Art. 9(1)(e) Framework Decision 2002/475/JHA.

⁶¹ Art. 1(4) Strafrechtsänderungsgesetz 2002 [Criminal Law Amendment Act 2002], BGBl. [2002] I 134/2002, 13.8.2002.

⁶² M. Böse, *supra* note 23, p. 83.

⁶³ Art. 8(3) Framework Decision 2004/757/JHA.

⁶⁴ Art. 8(2)(a) Directive 2014/62/EU.

⁶⁵ J. Scott, ‘Extraterritoriality and Territorial Extension in EU Law’, 62 *American Journal of Comparative Law* 2013, 87-125.

Table 1. The EU secondary law framework on extraterritorial jurisdiction in substantive criminal law.

Piece of legislation	Subject matter	Jurisdictional grounds														Optional exclusion of extraterritorial jurisdiction
		Territoriality		Active personality: nationals		Active personality: residents		Active personality: legal persons		Protective principle		Aut dedere, aut iudicare				
C	O	C	O	C	O	C	O	C	O	C	O	C	O	O		
FD 2008/841/JHA	Organised crime	✓		✓				✓				✓		✓		
FD 2005/667/JHA	Ship-source pollution	✓		✓				✓						✓		
FD 2003/568/JHA	Corruption in the private sector	✓		✓				✓				✓		✓		
FD 2002/946/JHA	Facilitation of entry, transit or residence	✓		✓				✓				✓		✓		
FD 2004/757/JHA	Drug-trafficking	✓		✓				✓				✓		✓		
FD 2008/913/JHA	Racism and xenophobia	✓		✓				✓						✓		
Dir. 2017/541/EU	Terrorism	✓		✓		✓		✓		✓		✓				
Dir. 2011/36/EU	Trafficking in human beings	✓		✓			✓		✓		✓					
Dir. 2011/93/EU	Sexual abuse and exploitation of minors	✓		✓			✓		✓		✓					
Dir. 2013/40/EU	Attacks against information systems	✓		✓			✓		✓	✓						
Dir. 2014/62/EU	Counterfeiting the Euro	✓		✓								✓				
Dir. 2018/1673/EU	Money laundering	✓		✓			✓		✓							
Dir. 2019/713/EU	Fraud and counterfeiting of non-cash means of payment	✓		✓			✓		✓		✓					
Dir. 2014/57/EU	Market abuse	✓		✓			✓		✓							
Dir. 2017/1371/EU	Fraud against the Union's financial interests	✓		✓			✓		✓							

Key: C = jurisdictional ground enshrined as compulsory for Member States; O = jurisdictional ground enshrined as optional for Member States

relevant connection with the regulating state, 'a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad'.⁶⁶ Scott then identifies effects-based jurisdiction as a separate legal category, including situations where a foreign action is deemed to produce effects within the state's domestic sphere.⁶⁷ Against this background, the same

⁶⁶ Ibid., at 90.

⁶⁷ Ibid., at 92.

author concludes that the EU approach towards extraterritoriality makes limited recourse to extraterritoriality in the strict sense and effects-based jurisdiction, while consistently relying on territorial extension techniques.⁶⁸

While Scott did not cover criminal law in her analysis, the trend identified in her research is only partially corroborated in our field of study. Considering the criteria used by the EU legislature to trigger the prosecution of foreign actions, it should be firstly noted that active personality with respect to nationals represents the only ground entailing a form of extraterritoriality in the strict sense. Indeed, a measure that entails nationality rather than territory as the relevant connection with the foreign action is considered to give rise to extraterritoriality rather than territorial extension.⁶⁹ This jurisdictional ground, however, is enshrined as compulsory in each piece of analysed legislation, thus revealing an approach taken by the EU legislator in making recourse to the form of extraterritoriality in the strict sense.

Conversely, active personality with respect to habitual residents meets the definition of territorial extension. In fact, this extraterritorial jurisdiction is triggered by a factual requirement – namely the offender's residence – establishing a genuine link with the territorial sphere of the Member State. This affirmation is no less true in relation to the *aut dedere aut iudicare* principle. While Scott argues that the presence of a foreigner in a Member State's territory is often accepted as a ground for exercising territorial jurisdiction,⁷⁰ well-established doctrine on the *aut dedere aut iudicare* principle considers it a form of vicarious extraterritorial jurisdiction.⁷¹ For that reason, the latter principle in Scott's taxonomy should be seen more correctly as a form of territorial extension, provided that the offender's local presence represents a territorial link with the prosecuting Member State.

Finally, the broadening of the active personality principle to legal entities, along with the protective principle, is considered to give rise to effects-based jurisdiction. In fact, the power of Member States' authorities to prosecute an offence committed abroad on this type of active personality depends solely on the specific effect of the crime, namely the existence of a benefit for a legal person established within their territory. The same reasoning applies to the protective principle, as the harmful effects of the offence are sufficient to trigger extraterritorial jurisdiction.

Consequently, an assessment of EU substantive criminal law in the context of Scott's taxonomy reveals that this discipline is characterised by jurisdictional grounds giving rise to territorial extension, effects-based jurisdiction or extraterritoriality in the strict sense.

⁶⁸ Ibid., at 94.

⁶⁹ J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 21-63.

⁷⁰ J. Scott, *supra* note 65, at 91.

⁷¹ See *supra*, section 2.2.

3. THE EVOLUTION OF THE EU'S EXTRATERRITORIAL APPROACH IN SUBSTANTIVE CRIMINAL LAW

Turning to the second prong of the proposed research topic – namely the assessment of the actual reach of extraterritorial jurisdiction under EU substantive criminal law instruments – this section will analyse the dynamic dimension of the phenomenon in question. Two different evolutionary lines will be considered here: firstly, the relationship between international crime control treaty practice and the EU legislative approach; secondly, the progression from pre-Lisbon instruments to the current criminal law directives.

3.1. A changing approach between international crime control treaties and the EU substantive criminal law framework

Approximation of national criminal jurisdiction is nothing new in international law, as every crime-related treaty has always imposed similar obligations on states. Nevertheless, the following analysis will reveal that EU criminal law has departed from international treaty practice, developing its own strategy on extraterritorial prosecution. This conclusion emerges from a comparison of international crime control treaties concluded by the European Union – namely the UN Convention against Transnational Organised Crime,⁷² the UN Protocols on Trafficking in Persons⁷³ and Smuggling of Migrants,⁷⁴ the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁷⁵ the UN Convention against Corruption,⁷⁶ the European Convention on the Prevention of Terrorism⁷⁷ – as well as the Convention on the Protection of the European Communities' Financial Interests,⁷⁸ to the EU secondary law instruments on the same topics.⁷⁹ The international agreements mentioned above basically rely on the same criteria outlined in section 2.3, namely the active personality principle, the protective principle and the *aut dedere aut iudicare* obligation. This is not surprising: it is commonly accepted in legal doctrine that EU legislation on criminal jurisdiction was originally derived from international practice.⁸⁰ How-

⁷² United Nations Convention against Transnational Organised Crime 2000 (UNTOC), 2225 *UNTS* p. 209.

⁷³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UNTOC 2000, 2237 *UNTS* p. 319.

⁷⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC 2000, 2241 *UNTS* p. 507.

⁷⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 1582 *UNTS* p. 95.

⁷⁶ United Nations Convention against Corruption 2003, 2349 *UNTS* p. 41.

⁷⁷ Council of Europe Convention on the Prevention of Terrorism 2005, *CETS* 196.

⁷⁸ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests, *OJ* [1995] C 316/49, 27.11.1995.

⁷⁹ Namely, Framework Decision 2008/841/JHA, Directive 2011/36/EU, Framework Decision 2002/946/JHA, Framework Decision 2004/757/JHA, Framework Decision 2003/568/JHA, Directive 2017/541/EU, Directive 2017/1371/EU.

⁸⁰ M. Böse, *supra* note 23, at 87. For a more in-depth analysis, not limited to substantive criminal law, see: E. Fahey, 'Joining the Dots: External Norms, AFSJ Directives and the EU's Role in the Global Legal Order', 41 *European Law Review* 2015, 105-121.

ever, taking a closer look at the relevant provisions, the use of these criteria by EU secondary law instruments currently in force differs sharply from the corresponding international arrangements.

In examining, firstly, the UN Convention against organised crime, its Article 15 identifies the principle of active personality as an optional ground, while under Framework Decision 2008/841/JHA it is compulsory. Conversely, the UN Convention enshrines the protective principle as an optional ground for extraterritorial jurisdiction, while this was not incorporated in the respective EU law provision. As far as the *aut dedere aut iudicare* principle is concerned, this obligation is included in both the international and the EU instruments.

Similar considerations apply with regard to the Protocols on trafficking in persons and smuggling of migrants: by supplementing the UN Convention on organised crime, these instruments refer to the same jurisdictional rules included therein. Conversely, Directive 2011/36/EU, as well as Framework Decision 2002/946/JHA, mandatorily require Member States to extend their jurisdiction based upon the active personality principle. The cited EU instruments also enshrine active personality with respect to legal persons. Furthermore, the directive on trafficking in human beings includes the extension of active personality to habitual residents, along with the protective principle.

Secondly, under the UN Convention on drug trafficking, territoriality represents the only mandatory ground for exercising jurisdiction, while states remain free to choose whether or not to expand their criminal jurisdiction extraterritorially by relying on the active personality principle.⁸¹ However, Framework Decision 2004/757/JHA compels Member States to rely on the active personality principle, also entailing the extension to legal entities discussed above.⁸² Indeed, the only faculty left to Member States in the context of the EU instrument is to limit the application of the (broad) active personality principle in cases of offences committed abroad. This is exactly the opposite perspective to the UN Convention: while, under the latter agreement, extraterritorial prosecution is a discretionary option, the Framework Decision applies the active personality principle as the rule, with any departure from it merely being an exception.

Thirdly, similar discrepancies can be identified by comparing the UN Convention against corruption with Framework Decision 2003/568/JHA. In fact, Article 42 of the cited agreement binds the Contracting Parties only with reference to territorial jurisdiction and the *aut dedere aut iudicare* rule. The corresponding EU instrument, however, mandatorily requires Member States to extend their criminal jurisdiction on the basis of the active personality principle with respect to nationals as well as legal entities.⁸³ As far as the *aut dedere aut iudicare* principle is concerned, the latter was also included in the analysed Framework Decision.⁸⁴

⁸¹ Art. 4 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁸² Namely the ground deemed to be a form of effects-based jurisdiction in the context of section 2.4.

⁸³ Art. 7(1) Framework Decision 2003/568/JHA.

⁸⁴ *Ibid.*, Art. 7(3).

Fourthly, other differences between EU and international criminal provisions emerge in the context of counter-terrorism law. In fact, Article 14 of the European Convention on the Prevention of Terrorism requires the State Parties to establish their extraterritorial jurisdiction based on the active personality principle limited to their own nationals, leaving to their discretion the option of relying on a range of different grounds. The EU Directive, on the other hand, enshrines active personality as a mandatory criterion also with regard to habitual residents and legal entities, not leaving any optional restriction to the Member States.⁸⁵

Finally, looking at the relevant provisions for protecting the Union's financial interests, both Article 4 of the related Convention and Article 11 of Directive 2017/1371/EU envisage mandatory jurisdiction based on the active personality principle. Nevertheless, the conventional norm allows Member States to derogate from this criterion. At the same time, the latter also envisages compulsory national criminal jurisdiction if an intentional abettor or inducer of the fraud is present in the territory of the Member State concerned, an atypical ground which has not been reproduced in Directive 2017/1371/EU.

It appears that the European Union has expanded the scope of extraterritorial prosecution compared to international treaty practice on criminal jurisdiction. In fact, the mandatory grounds for extraterritorial criminal jurisdiction in EU law are more numerous than those enshrined in international crime control treaties, although the criteria applied are generally the same.

3.2. The evolution from pre-Lisbon framework decisions to post-Lisbon substantive criminal law directives

Moreover, a closer look into the 'internal' sphere of the process of European integration reveals a significant change in the EU legislative approach between pre- and post-Lisbon secondary law instruments.

As anticipated, a remarkable evolution has occurred in the context of the optional grounds for extraterritorial jurisdiction. Indeed, the old-fashioned AFSJ framework decisions always grant Member States the option of restricting the application of the mandatory grounds laid down therein where the offence is committed outside their territory. More specifically, under this range of provisions 'a Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances'⁸⁶ the broad active personality principle⁸⁷ with respect to offences committed outside its territory. This exception is likely to lead to a sharp reduction in the extraterritorial reach of EU criminal law. However, this approach was completely overturned by post-Lisbon criminal directives. The latter only allow Member States to extend further their extraterritorial crim-

⁸⁵ Art. 19(1) Directive 2017/541/EU.

⁸⁶ Art. 7(1) Framework Decision 2008/841/JHA; Art. 7(2) Framework Decision 2005/667/JHA; Art. 7(2) Framework Decision 2003/568/JHA; Art. 4(2) Framework Decision 2002/946/JHA; Art. 8(2) Framework Decision 2004/757/JHA; Art. 9(3) Framework Decision 2008/913/JHA.

⁸⁷ More specifically, the cases in which the offence has been committed by one of its nationals or for the benefit of a legal entity established within its territory. See *supra*, section 2.3.

inal jurisdiction beyond the mandatory requirements envisaged therein, thus introducing optional grounds. In particular, depending on the piece of legislation in question, national legislatures can rely on the passive personality principle, as well as the extension of the active personality criterion concerning habitual residents or legal entities. This group of norms is shared by all substantive criminal law directives, with the only exception being the one on counterfeiting the Euro.⁸⁸

The contrast is evident: while Member States were allowed to opt for *less* (or even *no*) extraterritorial prosecution in the pre-Lisbon era, the only discretionary choice is *more* extraterritoriality in the current EU criminal law system. It seems that the Treaty of Lisbon's entry into force marked the establishment in secondary law of a 'level playing field' for extraterritorial prosecution of EU-harmonised offences, with which Member States must comply. Incidentally, as many pre-Lisbon framework decisions are still currently in force, the two normative approaches actually coexist in today's legal scenario.

Therefore, it follows from the above considerations that the EU has revised and broadened the scope of extraterritorial prosecution not only concerning provisions of international crime control treaties, but also with regard to its previous legislative approach.

4. CONFLICTS OF CRIMINAL JURISDICTION BETWEEN MEMBER STATES AND THIRD COUNTRIES: A WAY FORWARD

The previous section identified an evolutionary trend towards the increasing extent of extraterritorial jurisdiction in EU substantive criminal law. Such a dynamic process, however, entails a pathological dimension, consisting of the emergence of conflicts of jurisdiction. In fact, possible overlaps between different punitive systems prosecuting the same conduct represent a natural corollary of the extension of criminal jurisdiction beyond territoriality. However, the issue of conflicts with third countries' authorities has not received any great attention in legal doctrine.

'Conflicts of jurisdiction' in criminal prosecution is a twofold notion, traditionally being distinguished into two different categories. Firstly, so-called 'negative' conflicts of jurisdiction arise when 'no state is willing or able to prosecute'⁸⁹ an offence, thus leading to the offender's impunity.⁹⁰ Secondly, 'positive' conflicts entail situations where two or more states are in position to establish their own criminal jurisdiction over the same behaviour.⁹¹ As Caeiro pointed out, these notions reveal two specific legal issues: 'some state (or entity) should have or

⁸⁸ Directive 2014/62/EU.

⁸⁹ F. Zimmermann, 'Conflicts of Jurisdiction in the European Union', 3 *Bergen Journal of Criminal Law and Criminal Justice* 2015, 1-21, at 2.

⁹⁰ *Ibid.*

⁹¹ A similar definition, albeit limited to conflicts between Member States, has been provided in: P. Panayides, 'Conflicts of Jurisdiction in Criminal Proceedings: Analysis and Possible Improvements to the EU Legal Framework', 77 *Revue Internationale de Droit Penal* 2016, 113-119, at 113.

exert jurisdiction over a case, when in fact none has or does (*negative* conflict), or, conversely, [...] the concurrent holders should not adjudicate the case as if there were no claims from other jurisdictions (*positive* conflict).⁹²

With a view to assessing potential clashes between Member States and third countries in criminal prosecutions, it is worth focusing on positive conflicts. The latter lead to a distinction between two different legal issues. Firstly, as far as positive conflicts between Member States are concerned, a lack of cooperation between national criminal authorities in prosecuting harmonised offences is likely to arise. The EU legislature itself has identified these issues. To provide just one example, seminal rules on coordinating Member States' jurisdiction over the same behaviours were introduced in the context of the Counter-Terrorism Directive.⁹³ Moreover, dealing with positive conflicts between Member States forms part of the mandate of Eurojust, which is called upon to provide non-binding opinions in concrete cases.⁹⁴ A number of scholars have addressed these 'intra-EU' conflicts of jurisdiction.⁹⁵ In particular, a recent research project by the European Law Institute ultimately led to the drafting of some legislative proposals aimed at dealing with positive conflicts within the Union.⁹⁶

Secondly, positive conflicts of jurisdiction could arise with regard to third countries. Quite surprisingly, the debate developed on conflicts between Member States has not looked into the 'extra-EU' dimension of this issue, which is of great interest for the purposes of this paper.⁹⁷ One exception is in a recent chapter written by Böse, highlighting that conflicts of criminal jurisdiction are likely to constitute serious obstacles to the extraterritorial reach of EU substantive criminal law.⁹⁸ Consequently, this author takes a critical approach concerning the broad scope of extraterritorial jurisdiction as enshrined in the current legal framework, assuming *inter alia* that a lack of cooperation by third countries' authorities represents a deal breaker for extraterritorial criminal jurisdiction. This perspective is insightful: the effectiveness of the overall system of extraterrito-

⁹² P. Caeiro, *supra* note 17, at 369.

⁹³ Directive 2017/541/JHA, Art. 19(3).

⁹⁴ Art. 4(4) Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ [2018] L 295/138, 21.11.2018. See also: Eurojust, 'Guidelines for Deciding "Which Jurisdiction Should Prosecute?"', (2016) available at <https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016_Jurisdiction-Guidelines_EN.pdf>.

⁹⁵ Among the many: N. I. Thorhauer, 'Conflicts of Jurisdiction in Cross-Border Criminal Cases in the Area of Freedom, Security, and Justice: Risks and Opportunities from an Individual Rights-Oriented Perspective', 6 *New Journal of European Criminal Law* 2015, 78-101; M. Luchtman, 'Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters', 28 *European Journal of Crime, Criminal Law and Criminal Justice* 2020, 14-45.

⁹⁶ K. Ligeti *et al.*, 'Instrument of the European Law Institute. Draft Legislative Proposals for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union', *European Law Institute* (2017) available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf>. See also: K. Ligeti and G. Robinson (eds.), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford: Oxford University Press 2018).

⁹⁷ Some insights, however, from EU Member States' legal orders are provided in M. Böse *et al.* (eds.), *supra* note 22.

⁹⁸ M. Böse, *supra* note 23, at 97.

rial prosecution should represent one of the guiding criteria.⁹⁹ Indeed, if the approximation of Member States' extraterritorial criminal jurisdiction is aimed at preventing the emergence of safe havens for offenders, as well as at securing the EU's own interests,¹⁰⁰ any prescriptive extraterritorial claim by the EU should be regarded as functional to achieving these objectives. If obstacles such as conflicts of jurisdiction arise with regard to third countries, the EU clearly does not have the power to overcome them by regulating these clashes. Existing international agreements,¹⁰¹ as well as dialogue with third states' authorities through their Liaison Prosecutors seconded to Eurojust, could contribute to obtaining cooperation from the third states involved. Among the practice developed so far, it is interesting to note that a conflict with a third country concerning a deadly shipwreck was settled by virtue of dialogue between the national authorities, as well as by reference to the jurisdictional rules enshrined in Article 97 of the United Nations Convention on the Law of the Sea.¹⁰²

However, where similar overlaps of jurisdictions with third countries actually impair effective prosecution by Member States, any assertion of prescriptive extraterritorial prosecution by the EU legislature could be in vain. As a result, the exercise of criminal jurisdiction beyond the limits of territoriality may lack reasonable justification in relation to protecting the EU's interests, thus frustrating the derivative nature of Member States' extraterritorial prosecution driven by EU law as theorised in section 2.2.

It thus appears that the broad scope of extraterritorial criminal prosecution under EU law identified in the previous sections may need to be reconsidered if conflicts of jurisdiction are likely to prevent the practical enforcement of EU substantive criminal law. This affirmation is, however, far from conclusive, although it does set the scene for additional research on the actual impact of conflicts of jurisdiction with third countries on the exercise of extraterritorial criminal jurisdiction by the Member States. Further analysis in this area is crucially important in order to assess the appropriateness of the current EU approach towards extraterritoriality in substantive criminal law.

⁹⁹ This finding is further reinforced by making reference to well-established doctrine which recognises the principle of effectiveness as instrumentally underpinning the evolution of the EU criminal system. See *inter alia*: S. Melander, 'Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law', 5 *New Journal of European Criminal Law* 2014, 274-300.

¹⁰⁰ See *inter alia*: M. Kaijafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', 1 *European Criminal Law Review* 2011, 6-33.

¹⁰¹ For instance, see the Agreement on Mutual Legal Assistance between the European Union and the United States of America, OJ [2003] L 181/34, 19.7.2003.

¹⁰² United Nations Convention on the Law of the Sea 1982 (UNCLOS), 1833 *UNTS* p. 3. This case is reported in Eurojust, 'Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction', (2018) available at: <https://www.eurojust.europa.eu/sites/default/files/2020-09/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf>, at 10.

5. CONCLUSIONS

This article has dealt with a theoretical systematisation of extraterritorial jurisdiction in EU substantive criminal law, as well as assessing its actual reach. The analysis firstly provided a comprehensive conceptual reconstruction of the phenomenon, defined as the exercise by the Union's legislature of prescriptive jurisdiction over behaviours whose constituent elements are found entirely within a third state's territory. This assertion constitutes the basis for the subsequent implementation of enforcement and adjudicative jurisdiction by Member States' authorities. These findings are particularly indicative of the special nature of extraterritoriality in EU criminal law, an aspect to which this contribution has paid particular attention. In fact, the paper has highlighted that the separation of the prescriptive, enforcement and adjudicative functions of jurisdiction between the EU and its Member States stems from the double-layered structure of the European Union. At the same time, the analysis has demonstrated that the relationship between the two levels can be contextualised by making recourse to the traditional dichotomy between primary and derivative jurisdiction. From this perspective, the original and derivative dimensions overlap, as Member States should be deemed to be acting both in the state's interest and on the basis of the EU's own criminal policy. Having then categorised the criteria employed by the Union's legislature to stretch Member States' jurisdiction beyond the EU's external borders, it has been demonstrated that the EU approach to extraterritorial jurisdiction in substantive criminal law is not fully in line with Scott's findings.

As far as the actual reach of extraterritorial criminal jurisdiction under EU law is concerned, the outcome of the analysis is not yet conclusive. The paper has revealed that the Union's legislature has greatly broadened the scope of extraterritorial jurisdiction as designed by international crime control treaties, thus significantly diverging from international practice. A changing perspective on extraterritoriality between pre-Lisbon framework decisions and post-Lisbon AFSJ directives has also been identified: while the former allowed Member States' discretionary restrictions on the scope of extraterritorial prosecution, the latter only envisage the possibility of extending it. Notwithstanding the ever-increasing scope of extraterritorial criminal jurisdiction in EU secondary law, its actual reach is likely to be impaired by conflicts of jurisdiction between Member States and third countries. In this regard, further research is required, as a number of questions still need to be addressed: do these conflicts actually arise in the Member States' current practice? Are existing EU and international law instruments capable of effectively overcoming them? Can any conclusion of further international agreements with third states provide a contribution to dealing with such conflicts? Or, conversely, do extraterritorial conflicts of jurisdiction represent a deal-breaker for the extraterritorial assertion of enforcement and adjudicative jurisdiction by Member States? The answers to these questions are pivotal to assessing whether the EU current approach towards extraterritoriality in substantive criminal law should be reconsidered.

EUROPEAN LAW BEYOND EUROPEAN WATERS: THE EXTRATERRITORIAL APPLICATION OF EU FISHERY LAW

Celia Gohier*

1. INTRODUCTION

Fishing in the European Union accounts for 5.3 million tonnes of fish, a fleet of nearly 83,000 vessels and the largest maritime territory in the world. The European Union (EU) is, on the one hand, the world's fourth largest producer of fishing and aquaculture and, on the other, the world's largest importer of fish, seafood, and aquaculture products.¹ As such, the objectives of the Common Fisheries Policy (CFP) include protecting supplies to the European market, as well as safeguarding fish stocks. With a view to achieving the CFP's objectives, the Union is able to deploy numerous instruments, including the extraterritorial application of its law.

Introduced in the 1970s, the CFP has been reformed several times. The most recent of these reforms entered into effect on 1 January 2014.² However, since the 1990s and the introduction of the main Regional Fisheries Management Organisations (RFMO),³ the CFP has had an external component, allowing the European Union to find its footing in multilateral fisheries stock management and to apply its model.

Indeed, as a key reference in maritime law and management of jurisdictions across marine areas, the Montego Bay Convention⁴ demonstrates that there are numerous maritime zones operated by several jurisdictions. However, European Union regulations having extraterritorial scope⁵ apply in these inter-

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¹ 60% of the demand for fishing products comes from a third state, European Commission website, available at <<https://ec.europa.eu>>.

² Ibid.

³ See the Western and Central Pacific Fisheries Commission (WCPFC), Indian Ocean Tuna Commission (IOTC), International Commission for the Conservation of Atlantic Tunas (CICTA-ICCAT). The European Community also joined the UN Food and Agriculture Organisation (FAO) in 1991 after previously enjoying observer status: See, also, A. Tavares De Pinho, 'The Admission of the European Community as a Member of the Food and Agriculture Organisation of the United Nations (FAO),' 370 *Revue du Marché commun et de l'Union Européenne* [Common Market Law Review], 1993, 656-673.

⁴ The European Economic Community signed the Montego Bay Convention on 7 December 1984. It tabled its formal confirmation instrument on 1 April 1998, by the Council's decision of 23 March 1998 on the conclusion by the European Community of the United Nations Convention on the Law of the Sea of 10 December 1982 and the agreement of 28 July 1994 on the application of Part XI of that Convention (98/392/EC), *OJ* [1998] L179/1, 23.6.1998.

⁵ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported, and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, *OJ* [2008] L286/1, 29.10.2008, p.1 and Regula-

national areas, regardless of the ship's flag, geographical location, origin, or destination. The European Union currently applies its CFP through all possible channels to meet its challenges: it is the world's largest fish import market with an import economy worth 26 billion Euros.⁶

Regardless of whether the Union applies its standard outside its waters unilaterally through regulations, or exports it by participating in RFMOs, or by way of agreements, it is vitally important to investigate the breadth of this action. As such, it should be noted that extraterritorial regulations do not only complement international law when the action of RFMOs, in which the Union has real power, is no longer sufficient to achieve the crucial objectives of protecting European and global fishery resources. In fact, they also overlap with existing fisheries agreements in which the Union transposes certain values of the CFP.

Naturally, shortcomings and limitations rapidly come to the fore. For instance, the coherence of the CFP can be questioned in the event of any cross-checking of standards, while the actual control that the European Union can apply over the integrity of its standards is also debatable.

A legitimate question then arises: how significant is the use of the extraterritorial application of European fisheries standards for the stated aim of achieving the objectives of the CFP?

It is interesting to examine the notion of extraterritoriality of EU fishery law (2). It is also, then, worth analysing the EU management of fisheries resources outside its waters through extraterritoriality (3), notably, by way of the enforcement of extraterritorial measures through sanctions (4). Finally, it is interesting to examine the exporting of CFP rules by way of international agreements (5) and the overlapping of extraterritoriality and the exporting of EU law via international agreements (6).

2. THE NOTION OF EXTRATERRITORIALITY OF EU FISHERY LAW

The EU judiciary has repeatedly addressed the extraterritorial nature of EU law, particularly since the 2010s.⁷ In particular, we can pinpoint the definition found in the conclusions of Advocate General Wathelet in the *Front Polisario* case:

tion (EU) No 1380/2013 of the European Parliament And of The Council, of 11 December 2013, on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ [2013] L354/22, 28.12.2013.

⁶ Common Fisheries Policy in figures, Basic Statistical Data, 2016 Edition, European Commission, ISSN 1830-9127/1977-3684.

⁷ See, *inter alia*, ECJ, Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, 21 December 2011, EU:C:2011:864, pt.118 'On the other hand, where a flight that departs from an aerodrome situated in the territory of a third State does arrive at an aerodrome situated in the territory of one of the Member States of the European Union, or where the destination of a flight departing from such an aerodrome is an aerodrome situated in a third State, it is clear from Part B of Annex IV to Directive 2003/87, as amended by Directive 2008/101, that the aircraft operators performing such flights must report their emissions, for the purpose of determining, in accordance with Article 12(2a) of Directive 2003/87, as inserted by Directive 2008/101, the number of allowances that they must surrender for the preceding calendar year, a number which corresponds to the verified emissions, which

‘activities governed by EU law and carried out under the effective control of the Union and/or its Member States, but outside the territory of those Member States’ fall within the extraterritoriality of EU law.⁸

This phenomenon takes place by multiple methods and under several conditions. It is manifested by way of the application of EU law to legal subjects based outside the Union⁹ who are neither nationals nor residents of the Union’s Member States. Thus, extraterritoriality is the application of EU law to legal subjects outside the waters of the European Union, which do not fly the flag of any Member State and are not nationals of the latter. European Union law then applies in the absence of personal or territorial jurisdiction.

However, it is difficult to ascertain the contours of extraterritoriality in European law and thus to distinguish extraterritoriality from other mechanisms of the exporting of EU regulatory standards.¹⁰ Indeed, the extraterritoriality of European standards is not the only case where a European law is applied outside of the EU territory. The mere argument of the extension outside the territory under the control of the Union cannot justify the existence of the extraterritoriality of EU norms. The limitations of the concept¹¹ must then be clarified in order to understand exactly what extraterritoriality entails and what, on the other hand, falls within other mechanisms, such as normative exporting. In attempting to give a more precise definition of extraterritoriality, we could rely on the article by J. Scott,¹² which clarifies the distinction between extraterritoriality and territorial extension. While the former relates specifically to standards governing situations and behaviours occurring outside the Union in the complete absence of a territorial connection, the latter relates to EU law standards governing situations and behaviours occurring outside the Union with a criterion of territorial attachment. This territorial link is therefore another condition for observing the existence of extraterritoriality of the European standard. Similarly, extraterritoriality implies the application of EU rules in a territory where the Union has no sovereignty.¹³ This definition thus includes in extraterritoriality standards which apply outside the territory of the Union without any territorial connection, falling under the control of the Union independently of the sovereign state of the terri-

are calculated from data relating to all of those flights’; see, also, ECJ, Conclusions of Advocate General J. Kokott, 6 October 2011, EU:C:2011:637, 114.

⁸ ECJ, Case C-104/16 P, *Council of the European Union v. Popular Front for the Liberation of Saguia el Hamra and Rio de Oro (Polisario Front)*, 21 December 2016, EU:C:2016:973, concl. Adv. Gen. M. Wathelet, 13 September 2016, EU:C:2016:677, para. 270.

⁹ C. Rapoport ‘A la recherche des frontières de l’extraterritorialité du droit de l’UE ; essai d’identification des manifestations d’un phénomène nébuleux’ [In search of the borders of extraterritoriality of EU law; identification of manifestations of a nebulous phenomenon] in E. Dubout, F. Martucci, F. Picod (dir.), *L’extraterritorialité du droit de l’Union européenne*, [The extraterritoriality of the European Union law], (Brussels : Bruylant (ed.), Coll. Droit de l’Union européenne, forthcoming).

¹⁰ M. Cremona, ‘Extending the Reach of EU Law: The EU as an International Legal Actor’ in J. Scott and M. Cremona (eds.) *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press, 2019), 1-264.

¹¹ See C. Rapoport, *supra* note 9.

¹² J. Scott, ‘Extraterritoriality and Territorial Extension in EU Law’, 62 *American Journal of Comparative Law* 2014, 87-126.

¹³ See C. Rapoport, *supra* note 9.

tory concerned. In any event, it does not seem so appropriate to apply this definition to the Regulation to prevent illegal, unreported, and unregulated fishing¹⁴ (hereafter known as 'IUU Regulation'). This regulation contains provisions having a territorial link with the European Union. Such provisions contain conditions on accessing the European market for fishery resources taken from waters outside the Union, as well as provisions governing relationships between third parties not directly connected with the Union. Within the meaning of J. Scott's article, this regulation, containing provisions having a territorial connection with the European Union,¹⁵ falls within the category of territorial extension and not extraterritoriality. J. Scott explicitly classifies this regulation as a form of territorial extension.¹⁶ However, the link enshrined in the regulation is sometimes extremely tenuous, weak and indirect as it is mandatory for a third party fisherman, fishing in third party waters or landing in a third party port, to comply with the regulation. Such fishing operators must also comply with this regulation if a future economic operator wishes to export the goods to the European Union.¹⁷ Similarly, certain provisions requiring cooperation between third country ports do not have any link with the European Union or its waters.¹⁸ Thus, the mere likelihood of future access triggers the obligation for fishing operators, as well as for third states, to comply with the IUU Regulation, even if the goods never enter the European market or are never loaded onto a vessel entering Union waters. As the territorial connection identified in this regulation is either particularly weak and indirect or non-existent, it seems difficult to exclude entirely the extraterritorial nature of the IUU Regulation or any part of it. J. Scott considers that the territorial extension encompasses activities which have only a weak and indirect link with the Union's territory.¹⁹ However, it seems inappropriate to assume that the entire IUU Regulation entails only territorial extension. Some authors recognise that the existence of the extraterritorial nature of the standard can be identified according to the type of territorial link. C. Brummer then considers that a weak and indirect link may make it possible to consider a standard as being extraterritorial.²⁰

For this study, therefore, a broader view of extraterritoriality should be adopted, including provisions containing a particularly weak and indirect territorial link with the European Union. Norms having a direct territorial link to the European Union, which do not fall within the established framework of the definition of extraterritoriality, will therefore be excluded from this analysis.

A precise definition of extraterritoriality should be adopted in light of the objectives of the Common Fisheries Policy. In 2013, with the advent of the 'new

¹⁴ See Council Regulation *supra* note 5.

¹⁵ See Chapter II Council Regulation *supra* note 5.

¹⁶ J. Scott 'The Global Reach of EU Law' in J. Scott and M. Cremona (eds.) *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press, 2019), 1-264.

¹⁷ See Article 8 Council Regulation *supra* note 5.

¹⁸ See Articles 11, 54(2), 20(4) and 21 Council Regulation *supra* note 5.

¹⁹ See J. Scott *supra* note 12.

²⁰ C. Brummer, 'Territoriality as a Regulatory Technique: Notes from the Financial Crisis' 79 U. Cin. L. Review, 2010, 499-108.

CFP', the Council and Parliament established the environmental, economic, and social fisheries plan as the foundation for the CFP. Defined in Articles 38 to 43 of the Treaty on the Functioning of the European Union (TFEU), the management of marine resources is also included in the exclusive competence of the Union (Article 3 Treaty on the European Union). The objectives of the Common Fisheries Policy are defined by the TFEU and by the regulations constituting the CFP. Thus, Regulation 2371/2002,²¹ in force when the IUU Regulation was introduced, defines the objectives of the CFP as follows: compliance with environmental rules and sustainability of fish stocks. The current CFP regulation²² incorporates these objectives in addition to respect for international law, the United Nations Convention on the Law of the Sea,²³ Article 21 of the TEU and the objectives of the treaties on external action. In short, the European Union must ensure that EU fishermen do not suffer any distortion of competition in its waters and in third party waters, must guarantee that fish resources transported to the European market comply with the rules allowing traceability of fishing, and must ensure that global stocks are exploited according to the principles of sustainable fishing.

These elements can also be seen in each of the European Union's fisheries regulations, along with a constant reminder of compliance with UNCLOS and respect for the rules of regional fisheries organisations. Therefore, the European Union, in its action in the field of fishing outside its waters, respects international law and the rules of regional fisheries organisations (RFMO). This observation is valid whether the external action is unilateral, bilateral through sector-based fisheries agreements, or multilateral within fisheries forums. The European Union does not only use a unilateral scheme in the field of fishery to enforce its rights outside its waters. The EU has also concluded many fisheries agreements²⁴ and is a member of many RFMOs.²⁵

It should be noted that EU regulations applying in all waters, including the waters of third countries, will be extraterritorial standards.²⁶ The European Union's action in regional fisheries organisations or its conventional action on fisheries, on the other hand, will not. Numerous fisheries activities are governed by EU law, carried out under its effective control or that of one of its Member

²¹ Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, *OJ* [2002] L358/59, 31/12/2002.

²² Council and Parliament regulation (EU) No 1380/2013 of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, *OJ* [2013] L354/22, 28.12.2013.

²³ United Nations Convention on the Law of the Sea. Montego Bay Convention, 10.12.1982, *United Nations – Conventions* Vol. 1834 [1982], 1-31363.

²⁴ There are now 8 'active' agreements (Ivory Coast, Senegal, Liberia, Seychelles, Cook Islands and Mauritius, Cape Verde, The Gambia, Mauritania, Greenland, Morocco, and Guinea Bissau) and 7 'dormant' agreements (Gabon, Sao Tome and Principe, Madagascar, Mozambique, Equatorial Guinea, Micronesia, Solomon Islands).

²⁵ The list can be found on the Commission's official website. Available at <<https://ec.europa.eu>>

²⁶ See Council Regulation *supra* note 5.

States. Those activities are also conducted outside the EU's territory, such as the regulation establishing the system to prevent, deter and eliminate illegal, unreported, and unregulated fishing,²⁷ which have extraterritorial scope, as noted earlier. Conversely, the EU also uses other parallel mechanisms which differ from extraterritoriality. The European Union's action in regional fisheries organisations and the exporting of whole swathes of the CFP in bilateral fisheries agreements are illustrations of this mechanism. Examples include the European Union's action in the Western and Central Pacific Fisheries Commission (WCPFC), the Indian Ocean Tuna Commission (IOTC), the Food and Agriculture Organisation (FAO) and bilateral agreements with the Northern States or the eight partnership agreements for sustainable fisheries. All these elements now form an integral part of the European Union's Common Fisheries Policy.

3. EU MANAGEMENT OF FISHERIES RESOURCES OUTSIDE ITS WATERS THROUGH EXTRATERRITORIALITY

The EU uses traditional instruments to harness its Common Fisheries Policy to facilitate the extraterritoriality of its law through the form of unilateral acts. In response to the absence of binding rules in the multilateral framework of the late 1990s, the European Union followed the unilateral route and applied its standard through regulations that have very broad extraterritorial scope.²⁸ In the absence of any binding multilateral rules in the late 1990s, the EU established unilateral acts to regulate fishery in waters outside of its territory. The unilateral route is not inconsequential as such instruments allow their authors to determine voluntarily the possibility of any extraterritorial effect.²⁹ The authors of European fisheries regulations having extraterritorial scope produced these regulations while intentionally outlining the contours and legal scope of this extraterritoriality, justifying their interest by the absence of rules in the multilateral framework.³⁰ For example, the IUU Regulation establishes that fishing activities are to be monitored by an electronic register system which fishermen must complete and send to their flag state. The port of landing must examine the register and respect the IUU Regulation when verifying the information entered on the system. This register and its information will then mean the fish can be traced throughout their entire journey towards the end market, whether or not that it is in the EU.

This territorial scope seems compatible with international law. Furthermore, the IUU Regulation also appears legitimate in light of the objectives of the CFP. In fact, UNCLOS does not prevent the EU from imposing this registration mechanism for fishing outside its waters or rules governing relationships between

²⁷ Ibid

²⁸ G. A. Oanta, 'The European Union's System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' in J. M. Sobrino Heredia (ed.), *Sûreté maritime et violence en mer/Maritime security and violence at sea, 1st edition*, (Brussels: Bruylant 2011) 103-114.

²⁹ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2014, 87-126.

³⁰ See C. Rapoport *supra* note 9.

third party operators and a third country. Likewise, the IUU Regulation provides for cooperation of states with regional fisheries organisations where the extraction of the resource at sea is carried out in an area managed by RFMO.³¹

This cooperation also legitimises these provisions in light of the EU's objectives, as they empower the European Union to guarantee compliance with the objectives of the Common Fisheries Policy: it enables respect for the sustainability of stocks and compliance with the traceability of goods that may reach the European market.

However, the IUU Regulation, which gives the EU jurisdiction over vessels with which it has no connection, may seem a little odd from the perspective of international fisheries law. Indeed, it is often said that the only valid jurisdiction should be that with which the flag ship has a 'genuine link'.³² In fact, one of the principles enshrined in the United Nations Convention on the Law of the Sea³³ is the agreement that the flag state of a vessel has exclusive jurisdiction over vessels flying its flag. This Convention then requires the existence of a genuine link between the flag and the state. This concept of 'genuine link' has evolved and varies between the different international law texts, most notably between the 1958 Convention on the High Seas³⁴ and the 1982 Convention on the Law of the Sea, despite the fact that none of these conventions provides an exact characterisation of the concept.³⁵ While the 'genuine link' between a ship and a state has not been clearly defined, it implies that a state may have jurisdiction and control over a ship if it has a relationship that could infer that they are directly linked to each other. It could be argued that the Union does not always have this direct link with many vessels that are subject to control and included in the lists for non-compliance with its extraterritorial regulations.

The scope is vast, as EU fisheries regulations apply 'in third-state waters and international waters'.³⁶ As far as international waters are concerned, it is remarkable that the European Union enacts its own jurisdiction over third party vessels for an area that normally has no jurisdiction other than the flag state of

³¹ See Article 13 Council Regulation *supra* note 5.

³² S. Beslier, 'The Exercise of Jurisdiction over Vessels: New Developments in the Sector of Fisheries' in E. Franckx, P. Gautier (eds.) *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant, 2011), 226.

³³ Multilateral Convention, signed on 10 December 1982, 1833 United Nations Treaty Series, pp.397-581.

³⁴ Text in United Nations Treaty Series, Vol. 450, p.11.

³⁵ R.R. Churchill, C. Hedley, *The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships*, 'A Study prepared for the International Transport Workers' Federation, (Cardiff: Cardiff Law School, October 2000), 6-73.

³⁶ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported, and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, OJ [2008] L286/1, 29.10.2008, p.1 and Regulation (EU) No 1380/2013 of the European Parliament And of The Council, of 11 December 2013, on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ [2013] L354/22, 28.12.2013.

the ship that crosses it.³⁷ This application of the European regulation in high seas remains coherent with the stated objective of these regulations. The European Union regulations are able to be applied effectively, as the distance from the coast tends to reduce the interest of the coastal state in applying fishing rules.³⁸ In fact, as 'no state may validly purport to subject any part of the high seas to its sovereignty',³⁹ states have never shown great ambitions to protect this space from overfishing, preferring a positive economic balance. The EU regulation, by being applied in an area where there is no jurisdiction other than that of the ship's flag, bridges this gap in international fisheries law. Without replacing the jurisdiction of the flag state, the European regulations impose an additional obligation on the state that is fishing in those waters. For the European Union, it is therefore a matter of applying a rule to operators and to a third country, regardless of the area of activity concerned. Thus, certain articles, such as articles 11, 8 and 54(2)⁴⁰ of the IUU Regulation still apply even in the presence of a particularly weak and indirect link between the European Union and an operator, as the mere assumption of a possible future landing in Union ports obliges a fisherman to comply with the standard.

It is more surprising to observe the European regulation in relation to waters under the sovereignty or jurisdiction of third states. The aim here is nothing other than to enforce a European regulation on the territory of another non-European state. Moreover, 'high seas' is clearly defined in the regulations in Chapter 2 'Definitions',⁴¹ the European Union is careful not to define 'waters under the jurisdiction of a third state'. This implies that its regulations apply to the territory of a non-Member State, which has therefore not participated in establishing this right or consented to its application in its territory and to its ships. These precautions are more diplomatic than legal. The European Union defines its action in the waters of third states as 'cooperation', aimed at controlling goods that may eventually arrive in Europe.⁴² However, the link between the European Union and the third territory, or the third party ship, is non-existent, or weak and indirect, when considering that the landing state is not necessarily the expeditionary state⁴³ to the Union. Put into the perspective of all the debates that preceded the extensions of the Economic Exclusive Zone (EEZ)⁴⁴

³⁷ Ibid

³⁸ T. Treves, 'Jurisdiction Over Vessels in the Areas of Pollution and Fisheries: General Report' in *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction*, (Brussels: Bruylant, 2011), 1-28.

³⁹ Article 89 United Nations Convention on the Law of the Sea. Montego Bay Convention, 10.12.1982, *United Nations – Conventions* Vol. 1834 [1982], 1-31363.

⁴⁰ See Article 37 Council Regulation *supra* note 5 'non-assistance to IUU fishing vessels, and non-participation in fish processing, trans-shipment or joint fishing operations with them, and so on.'

⁴¹ See Article 2 Council Regulation *supra* note 5, 'high seas' means all the parts of the sea as defined in article 86 of the United Nations Convention on the Law of the Sea *supra* note 39.

⁴² See Article 1 Council Regulation *supra* note 5.

⁴³ An expeditionary state is the state from which the fishery resource departs to its final place of marketing.

⁴⁴ The extension of the EEZs to 200 miles has increased the extent of the sovereignty of coastal states to 200 nautical miles. The 'Cod War' between the United Kingdom and Iceland can

and power over maritime areas, the application of European fisheries regulations in areas under third party sovereignty demonstrates a very deep-seated presence of European standards in waters outside its jurisdiction.

4. THE ENFORCEMENT OF EXTRATERRITORIAL MEASURES THROUGH SANCTIONS

However, the unilateral path seems to be particularly coherent for enforcing the objectives of sustainable fisheries, which the Union intends to promote.⁴⁵ Undeniably, the sanction regime included in Article 28 of the IUU Regulation is not anecdotal. Typically, it should be noted that international sanctions are in themselves a form of extraterritoriality of EU law. They are particularly intense as they apply in the absence of consent from the subjects of the rights in question.⁴⁶ The territorial or personal link is once again entirely absent. The presence in the IUU Regulation of a sanction system is testimony to the extraterritorial nature and the presence of a long-standing extraterritoriality of EU law in this area. The sanction system in the IUU Regulation is particularly advanced. The most common penalties involve the attribution of yellow and red cards.⁴⁷ The European Union expressly uses the term “yellow and red cards” to describe the method of sanctioning states that fail to comply with the IUU Regulation by not checking the compliance of their flag vessels with the IUU Regulation or by failing to sanction illegal behaviours.

For instance, the IUU Regulation envisages a control procedure which can be implemented by the European Union as soon as it has doubts about a ship or state's compliance with its regulations. It sends a request to the state for information on its respect of EU regulations. Depending on the response by the latter, the EU gives to the state a yellow card, facilitating an ‘indictment’ of the situation. In the event of no response, or a clear lack of knowledge of the IUU Regulation, the EU places the state on the red card list, with the immediate effect of prohibiting that state from fishing in the European Union zone and from disembarking ships in EU ports, as well as restricting imports of fish from that state. The EU then produces a list, which itemises the dates of formal notice, the responses of the states, the date of the attribution of yellow or red cards, and the expiry date of the card.⁴⁸ The procedure, which can result in strict sanctions, given the importance of the European market in terms of fisheries resources, remains entirely at the discretion of the European Union, which can control any state in relation to fishing by its vessels in any waters of the world. Moreover, it is impossible for ships or states on this list to dispute the European Union's decision. These sanctions, being almost unavoidable and greatly reduc-

be cited as an example of these consequences.

⁴⁵ See, also, D. Guilfoyle, *Shipping Interdiction, and the Law of the Sea* (Cambridge: Cambridge University Press, 2009).

⁴⁶ See C. Rapoport *supra* note 9.

⁴⁷ See Article 28 Council Regulation *supra* note 5.

⁴⁸ Illegal fishing overview of existing procedures towards third countries, Commission's official website, available at <<https://ec.europa.eu>>.

ing the fishery and trade of fish products by the states and ships concerned, are often combined with sanctions in the multilateral framework.⁴⁹

When considering the EU list of sanctions, it should be noted that the prospects of a sanction force the state to comply with the European rule with just a brief delay. For example, states only take a few months to comply with the regulations after receiving a yellow card.⁵⁰ The extraterritoriality of fishing standards is a game of 'carrot and stick', and the extraterritoriality of the CFP standards has greater value in view of the attitude of operators to potential sanctions. States and operators therefore overwhelmingly comply with European regulations having extraterritorial scope, either by establishing similar rules in their own internal order (e.g. South Korea), or by simply complying with the regulation as it stands. This was the case with regard to Kiribati, which has just seen its sanctions withdrawn.⁵¹

However, the sanctions are not limited to the list. The European Union may denounce agreements for sustainable fishing in the event of any non-compliance with European rules imposed by the European Union as they are contained in a regulation itself having extraterritorial scope. This is the case of the old fisheries agreement between the European Union and the Comoros, denounced by the European Union in 2018⁵² after Comoros had misapplied the IUU Regulation. The prospect of a future agreement with the European Union is also sufficient to encourage third party compliance with the standard.⁵³ The regulation, with its extraterritorial provisions, is therefore an instrument that facilitates normative convergence. Indeed, after years on the list, some states, motivated by new negotiations regarding sustainable fishing agreements, find themselves complying with European regulations, rather than with the rules present in RFMO. The Republic of Guinea, for example, had begun negotiations with the European Union in this regard before abandoning them again.⁵⁴

In any case, the IUU Regulation⁵⁵ stipulates that its Member States may inspect or dock vessels in EU waters, or on the high seas, even if these vessels are not in waters adjacent to the coasts of the Member State.⁵⁶ Nevertheless, when examining the IUU Regulation, the terms 'boarding' and 'control' cannot be found, while the term 'inspection' is preferred, being weaker in the wording

⁴⁹ These sanctions take the form of the ship's flag state being placed on a blacklist of IUUs.

⁵⁰ Illegal fishing overview of existing procedures towards third countries, Commission's official website, available at <<https://ec.europa.eu>>.

⁵¹ "EU lifts Kiribati's "yellow card" following reforms of its fisheries control system", 06.12.2020, European External Action, available at <<https://eeas.europa.eu>>.

⁵² Council Decision No 2018/757 of 14 May 2018, OJ [2018] L128/13, 24.5.2018.

⁵³ Illegal fishing overview of existing procedures towards third countries, Commission's official website.

available at <<https://ec.europa.eu>>.

⁵⁴ The agreement with Guinea was suspended after the military coup, the cessation of compliance with international fisheries rules and Guinea's failure to respond to EU administrative penalties for IUU fishing in state waters. See 'Agreement in the Field of Fisheries between the EU and Guinea', European Parliament Think Tank, 11.6.2020. See, also, article 38(9) Council Regulation *supra* note 5.

⁵⁵ See Council Regulation *supra* note 5.

⁵⁶ See, also, E. Papavtavidis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, (Oxford: Hart, 2013).

but no different in the concept. The use of vocabulary specific to its purpose demonstrates that the EU understands that this scope of EU law is not without consequences and that extraterritoriality is problematic despite being lawful.

However, essentially, if no rule exists in international law, this is because states have not consented to being bound by specific rules in international waters. Replacing this void with a European regulation may be seen by some states as invasive action. Cambodia or St Vincent and the Grenadines, for instance, which do not have a fisheries agreement with the EU, refuse to comply with European regulations and never respond to the Union's requests.⁵⁷ As to the facts, the European Union applies the procedure laid down in Articles 26 and 27 of its IUU Regulation, even without a direct territorial link with the flag state of the vessel concerned. The EU sends a request for an explanation of the finding of IUU fishing from the third state concerned. The latter can respond by demonstrating the absence of IUU fishing or accept the requirements of IUU fishing and solve the problem. However, a third country may not respond to the European Union's request. Article 31 of the IUU Regulation then goes further, by listing in the description of non-cooperating third states 'the third state flag of the ship, the ports of third states, the traders of third states', without a direct link to a territorial attachment to the European Union.

Extraterritoriality still has a bright future ahead: it is used to apply European standards outside EU waters and also to compensate for the increasing impossibility of negotiating fisheries agreements.⁵⁸

5. THE EXPORTATION OF CFP RULES THROUGH INTERNATIONAL AGREEMENTS

Extraterritorial fishing instruments have always coexisted with instruments that are applied outside the territory of the Union, but that are not, as such, extraterritorial in the definition used for this analysis. These instruments have a direct territorial or personal link with the European Union and EU law does not apply beyond its borders. In order to understand the scope of the European Union's extraterritorial regulation, it is essential to examine its overlap with other existing forms of normative projection.

While, in fact, the different mechanisms took the same path, they remain very different and follow different logics,⁵⁹ albeit aiming to achieve the same objective: to promote sustainable fishing. As such, partnership agreements for sustainable fisheries and the European Union's action within regional fisheries organisations complement and coexist with the unilateral instruments of the European Union.

⁵⁷ Illegal fishing overview of existing procedures towards third countries, Commission's official website, available at <<https://ec.europa.eu>>.

⁵⁸ Fisheries agreements are becoming increasingly difficult to negotiate.

⁵⁹ M. Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in J. Scott and M. Cremona (eds.) *EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press, 2019), 1-264.

Fisheries agreements are one of the best known instruments of the CFP to export the standard. Firstly, a distinction must be made between the two types of fisheries agreements entered into by the European Union: the Northern conventions⁶⁰ (which concern only Iceland, Norway, and the Faroe Islands), and partnership agreements for sustainable fisheries.⁶¹ While the former are essentially practical, largely facilitating the management of shared stocks, the latter are much more interesting for the purposes of our study. Indeed, in exchange for financial support from the European Union, partnership agreements for sustainable fisheries allow the EU to have access to the EEZ of the partner state. Above all, the European Union provides it with 'support to promote sustainable fisheries development in the partner countries, by strengthening their administrative and scientific capacity through a focus on sustainable fisheries management, control and monitoring.'⁶² The appearance of the phrase 'focus on monitoring, control, and surveillance' at the beginning of the texts is particularly indicative of the content of the agreement. Indeed, these are, just as for the agreement with Morocco,⁶³ terms that refer directly to the inclusion in the whole European Union *acquis* applicable in Union waters. The same words are written verbatim in the agreement of several European regulations: it is almost systematic in partnership agreements for sustainable fishing.⁶⁴ Far beyond mere normative convergence, but not yet extraterritoriality, the layer of the European Union *acquis* and the CFP in fisheries agreements reflects the strong export of certain CFP instruments to states that are not necessarily geographically close to the European Union (e.g. the Cook Islands⁶⁵ or Kiribati, with which an agreement is being negotiated).

The European Union does not simultaneously refrain from exporting these same standards to international forums. The CFP is part of a multilateral fisheries management framework, which consists only of multilateral agreements to which the Union has made a very significant contribution.⁶⁶

Likewise, the European Union attaches great importance to cooperation between states and remains committed to the multilateral management of fisheries resources in compliance with Article 21 TEU which promotes international cooperation. In its agreements, the EU never fails to constantly remind

⁶⁰ Agreement between the European Economic Community and the Kingdom of Norway, *OJ* [1973] L171/2, 27.6.1973.

⁶¹ See Fisheries Agreements *supra* note 24.

⁶² European Commission official website, available at <<https://ec.europa.eu>>

⁶³ Sustainable fisheries partnership agreement between the European Union and the Kingdom of Morocco *OJ* [2019] L77/8, 20.3.2019.

⁶⁴ *Ibid.*

⁶⁵ Decision (EU) No 2020/1545 of the Council of 19 October 2020 relating to the signing, on behalf of the Union, and the provisional application of the agreement in the form of an exchange of letters between the European Union and the Government of the Cook Islands concerning an extension of the protocol for the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands *OJ* [2020] L356/7, 26.10.2020.

⁶⁶ C. Mestre *et al.*, 'Chapitre I – Le cadre multilatéral de la politique commune de la pêche' [Chapter I – The Multilateral Framework of the Common Fisheries Policy] in C. MESTRE *et al.*, (eds.) *Common Agricultural Policy and Common Fisheries Policy* (Brussels: Éditions de l'Université de Bruxelles, 2011), 627-635.

its partners of its approach in accordance with international law. The EU still plays a predominant role in RFMO: it helps to construct most of the rules that form the legal corpus of RFMO around the globe.⁶⁷ However, the EU's strategy also varies widely: in some cases, the extraterritorial acts will complete the RFMO standard, will supplement it and will also act outside the forum when the provisions do not go far enough.⁶⁸ A typical example is the EU's work with the WCPFC⁶⁹ or the IOTC.⁷⁰

Extraterritorial regulations thus become instruments that are in harmony with other methods, in line with normative exporting of the CFP law. It is remarkable, then, to read the statutes of the IOTC, the phrases of which can be found word-for-word in the regulations of the European Union, which predate those statutes, enshrining the fight against IUU fishing in the Indian Ocean. In this case, the Union exported its own standard, which is transcribed within the organisation.

This is, however, not true for all of these organisations. For instance, the Western and Central Pacific Fisheries Commission's statutes reveal merely an extremely diluted trace of the European standard. A comparison of the European lists⁷¹ and the list of the RMFO of the states not meeting the standard reveals that the European Union places more states in the control procedure than the WCPFC.⁷² For example, Tuvalu is subject to administrative proceedings before the Union, but not before the WCPFC. It is impossible to confuse the application of the extraterritorial standard from the application of the organisational one. The extraterritorial standard is fully applied despite the existence of exporting phenomenon of the European fishing rule.

In addition, the EU tends to break a few of the rules of the RFMO in order to apply its own extraterritorial regulations and pursue its objectives of promoting sustainable fishing. Therefore, while Article 10 of the WCPFC calls for cooperation and coordination between member states of the forum, the Union does not hesitate to position almost all of the WCPFC's members in the IUU Regulation's control procedure. Moreover, the EU acts unilaterally when the action in the international forum is not sufficiently effective. Indeed, although there is no legally established hierarchy between extraterritoriality and normative export in the field of fisheries, and although the European Union has not adopted any official position, it should be noted that the EU tends to prefer the unilateral path and extraterritoriality over multilateralism and the conventional path of normative exporting for some areas, in view of the impossibility of concluding agreements or enforcing an international standard by way of a forum.

Thus, the consequent difference in the sanction level definitely gives greater value to the Union's extraterritorial acts. In fact, as they remain acts of EU law

⁶⁷ Ibid.

⁶⁸ P. Heckler, 'Regional Fisheries Management Organisations, Defining the EU and Member States roles' in R. Wessel and J. Odermatt (eds.), *European Union and International Organisations*, (Groningen: University of Groningen, 2019), 429-445.

⁶⁹ The Western and Central Pacific Fisheries Commission (WCPFC).

⁷⁰ Indian Ocean Tuna Commission (IOTC).

⁷¹ Illegal fishing overview of existing procedures towards third countries.

⁷² WCPFC IUU Vessels List for 2021, effective from 13 February 2021, WCPFC official website, available at <<https://wcpfc.int/wcpfc-iuu--vessel-list>>.

and not acts of international law, such as agreements or acts of international organisations,⁷³ the Union retains full jurisdiction over its actions: when exported to a forum, the standard is fundamentally no longer solely European.⁷⁴ It becomes a standard of an RFMO, with the scope granted to it by that RFMO, sometimes non-binding.⁷⁵

6. THE OVERLAPPING OF EXTRATERRITORIALITY AND EXPORTING OF EU LAW VIA INTERNATIONAL AGREEMENTS

Agreements and multilateral forums, which are not extraterritoriality of European standards, but the normative exporting of European rules, may tend to merge and mix. They are not in demand and the use of one does not preclude the use of the other. Thus, for the same area, it is perfectly possible to see the same European standard being exported through a bilateral agreement, within an RFMO, and the European regulation being applied by way of extraterritoriality. One illustration of this phenomenon can be seen in the case of Kiribati. The EU enforced its IUU fisheries regulation there,⁷⁶ along with a bilateral agreement⁷⁷ which transcribed the same regulations, including whole sections of the CFP, with those relating to stock management and almost all existing material laws.⁷⁸ When the IUU Regulation is applied in practice, there are provisions therein which facilitate cooperation between organisations and the European Union. Thus, when the European Union finds that a member of the RFMO is not complying with the IUU Regulation and decides to apply to that state a system of administrative penalties, it sends a report about that state to the competent RFMO.⁷⁹ Similarly, the RFMO systematically sends to the European Union the list of states that are allegedly not complying with the RFMO's anti-IUU procedures. Hence, it is perfectly possible in theory for a state to be subject to administrative sanctions of the European Union under the IUU Regulation, and sanctions of the RFMO under the forum standard, for the same conduct.⁸⁰

These instruments, which sometimes coexist in very restricted geographic zones, have the same vocation. Although partnership agreements for sustainable fisheries have an underlying economic vocation, RFMO promote respect for marine ecosystems in resource management, and the regulations are first and foremost tools for managing resources. They achieve the same objectives. This is the main common aspect of all these instruments: they enable the European Union to promote its sustainable fisheries objectives and values.

⁷³ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 American Journal of Comparative Law 2014, 87-126.

⁷⁴ See C. Rapoport *infra* note 81.

⁷⁵ See C. Mestre *et al.*, *supra* note 66.

⁷⁶ *Ibid.*

⁷⁷ Agreement with the Kiribati Islands, adopted by Council Regulation (EU) No 998/2012, 9 October 2012, OJ [2012] L300/1, 30.10.2012.

⁷⁸ See, for example, the Western and Central Pacific Fisheries Commission (WCPFC).

⁷⁹ See Sanctions and Procedures Lists *supra* note 71 and 72.

⁸⁰ *Ibid.*

The risk of these structures being confused with one another is limited as their legal intensity and the extent of the Union's export depend largely on the agreement or the RFMO in question. Indeed, unlike extraterritorial regulations, the extent of which is established by their author, the level of normative exporting depends mostly on other criteria, such as the sanctions regime, inspection schemes, and the degree of ascertained link. In fact, the RFMO only controls and sanctions Member States fishing inside the organisation's waters. They do not control or sanction states without an explicit direct link to the forum, and the agreements only apply to its zone and its contracting parties.⁸¹

These different degrees tend to take account of the fact that organisations and agreements complement and are supplemented by unilateral acts of extra-territorial scope. For example, in the agreements, the degree of exporting of the standard depends greatly on the nature of the European Union's partner. In the agreements with Morocco (2019)⁸² and with the Seychelles (2006),⁸³ the difference in degree is striking: the agreement with Morocco contains word-for-word the provisions of the IUU Regulation, while the agreement with Seychelles only refers to compliance with the relevant international law. This difference may be a reflection of two things: the first consists of the fact that if the country is geographically closer to the Union, the EU will tend to export its standard to a higher degree and will need fewer extraterritorial actions to ensure compliance with its sustainable fisheries management objectives.⁸⁴ The other consists of the fact that the Union, as it progresses over the years, will tend to export its standard with greater intensity. This intensity will be closer to that recognised with the extraterritoriality of the standard and will make the distinction more difficult to ascertain. It can be seen from reading the agreement with the Seychelles that the Union does not see it so much as a method of exporting its CFP but above all of concluding an agreement allowing European vessels to have access to the Seychelles fishing area. The vocabulary of the CFP is hardly used and the agreement is very insipid, similarly to the agreements of the early 2000s on fisheries: not envisaging dispute resolution but, rather, financial contributions in exchange for EU access to partner state fishing zones.⁸⁵ This agreement merely refers to international law in place in the region and organises trade in

⁸¹ C. Rapoport, 'L'Union européenne exportatrice de normes environnementales dans ses relations conventionnelles avec les pays tiers' [The European Union exporting environmental standards in its conventional relations with third countries] in J. Auvret-Finck (ed.) *La dimension environnementale de l'action extérieure*, [*The environmental dimension of external action*] (Nice : Colloque de droit européen Nice, Pedone, 2017).

⁸² Sustainable fisheries partnership agreement between the European Union and the Kingdom of Morocco OJ [2019] L77/8, 20.3.2019.

⁸³ Council Regulation (EC) No 1562/2006 of 5 October 2006 concerning the conclusion of the Fisheries Partnership Agreement between the European Community and the Republic of Seychelles OJ [2006] L290/1, 20.10.2006.

⁸⁴ A quick look at the list of states covered by a card procedure for disrespecting the IUU Regulation reveals that the states concerned are still geographically positioned far away from the EU, which has no agreement with them, or only essentially economic agreements.

⁸⁵ These financial contributions must nevertheless enable the state to comply with the sustainable fishing rules and enable the development of the blue economy as defined by the CFP. This blue economy today includes compliance with IUU regulations.

the fished resources. Extraterritorial regulations are then truly valuable as they allow EU law to be applied where the Union has not used other methods to apply its norms and implement its objectives.

7. CONCLUSION

The European Union applies its fishery policy abroad through different channels, ranging from unilateral regulations and bilateral agreements to participation in international organisations.

Some international agreements take up the terms of the EU's regulations with such precision that it is difficult to distinguish between extraterritoriality and territorial extension. This is the case, in particular, for agreements with states close to the Union with which it has a very extensive relationship. These neighbours agree to be subjected to the IUU provisions not as provisions of the regulations (i.e. unilateral instruments) but as provisions of the fisheries agreement between them and the European Union.⁸⁶ The partner states therefore respect a rule having the same substance as the IUU Regulation, by way of a direct link: this agreement allows them to access the European market directly.

In the absence of agreements covering large maritime areas, the IUU Regulation appears to be a sustainable solution. The extraterritoriality of this EU regulation, thanks to the control and sanction system, appears to be an effective standard for applying IUU outside of EU waters. The greatest added value of extraterritoriality would therefore lie in the absence of consent or the impossibility of including the IUU provisions in a conventional instrument. Cooperation between the EU and the RFMOs and the complementary nature of European and international standards should not be underestimated but the difficulties in negotiating fisheries agreements and the absence of binding rules in such forums inevitably give real added value to the European Union's extraterritorial fisheries instruments.

⁸⁶ Sustainable fisheries partnership agreement between the European Union, on one side, and the Government of Greenland and the Government of Denmark, on the other, OJ [2021] L175/3, 18.5.2021.

CARROTS OR STICKS? HOW THE EUROPEAN UNION AIMS TO ACHIEVE RESPECT FOR FUNDAMENTAL RIGHTS BEYOND ITS BORDERS

Areg Navasartian Havani*

1. INTRODUCTION

Throughout the course of its existence, the European Union (EU) has progressively developed as an international actor, extending its global reach through multiple policies and international cooperation. As this international actor, the EU has particularly vowed to promote respect for and advancement of human rights on the world stage.¹ The culmination of this came in the adoption of the Strategic Framework and Action Plan on Democracy and Human Rights,² which laid out the EU's commitment to mainstream human rights throughout its entire external action, along with the strategies to be employed to achieve this goal. To this end, the EU has developed a strong autonomous legislative and policy arsenal, to meet its obligations under Article 21 TEU, enshrining in the Treaties the objective of promoting and protecting human rights in all areas of the EU's external action, as well as the imperative of coherence in this field.

Four overarching categories of autonomous tools can be identified among this arsenal:³ the first is dialogue, whereby the EU engages with third countries through different forums, be it in the framework of multilateral organisations, or in Brussels. The most significant European tool in this area is the Human Rights Dialogue.⁴ The EU not only engages with other entities at State level, but also with civil society, including NGOs and trade unions, in order to exchange experiences and good practices and to make recommendations on the human rights challenges faced in the third country. The second are financial instruments: through unilateral decisions, the EU can allocate funds to third country civil society organisations specifically for the purposes of advancing human rights, the most prominent financial instrument in this area being the Human Rights and Democracy Thematic Programme⁵ (HRDTP). The third category is a re-

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¹ Art. 3(5) TEU.

² Council, 25 June 2012, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12.

³ K. E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press 2014), at 109.

⁴ Council of the European Union, *EU Guidelines on Human Rights Dialogues with Third Countries – Update*, 22 December 2008, 16526/08.

⁵ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, OJ [2014] L 77/85, 15.3.2014.

strictive measures policy,⁶ consisting mainly of asset freezing in the EU, trade embargoes and travel restrictions. The EU imposes sanctions (sometimes independently from the UN Security Council) on certain States for human rights violations, or on targeted persons, including government officials, political figures or private individuals. Finally, the fourth overarching category is the use of conditionality clauses in bilateral and multilateral agreements with third countries. While the EU can activate these clauses unilaterally, they are embedded in negotiated agreements and entail more complex and broader considerations which go beyond the purposes of this paper.⁷

Given the imperative established by Article 21 TEU, the question is raised as to whether the EU uses these three methods coherently; dialogue, financial aid and restrictive measures are indeed interconnected, pursuing the same intended outcome of a change in behaviour within the third country with regard to human rights and an alignment with EU values. It is argued here that this objective amounts to the extraterritorial application of EU law; this is seen as the EU's practice of exporting its values and championing them on the world stage and in third countries.

In an attempt to answer this question, this paper will analyse the coherence of the mobilisation of Human Rights Dialogues, the HRDTP and restrictive measures for human rights violations. Firstly, it will address the imperative of coherence in the EU's human rights policy, the difficulties involved in achieving it and the risks linked to incoherence. It will then analyse each instrument individually and will critically assess their effective and coherent use. By way of a conclusion, it will provide a schematic overview of the combined use of each instrument with regard to third countries currently subject to restrictive measures for human rights violations. On a methodological note, throughout the paper, we will address the issues that arose in researching this topic and which have impacted its outcomes. Furthermore, it is important to position the EU's human rights policy in the broader context of the EU's external relations, which are not solely driven by human rights considerations (the EU as a normative actor) but also by strategic interests (the EU as a realist actor).

2. THE IMPERATIVE OF COHERENCE IN THE EU'S HUMAN RIGHTS POLICY: THEORETICAL CONSIDERATIONS

The EU's self-proclaimed identity as a normative actor, capable of influencing policies on the international stage, is conditioned by the effectiveness and

⁶ Art. 28 TEU and 215 TFEU.

⁷ For more information on human rights clauses see, for example, L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP 2005); J. Wouters *et al.*, *The European Union and Human Rights: Law and Policy* (Oxford: OUP 2020); I. Zamfir, 'Human Rights in EU Trade Agreements. The Human Rights Clause and its Application', European Parliamentary Research Service, (July 2019), available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf)>; K. L. Meissner, L. McKenzie, 'The Paradox of Human Rights Conditionality in EU Trade Policy: When Strategic Interests Drive Policy Outcomes', 26 *Journal of European Public Policy* 2019, 1273-1291.

credibility of its actions.⁸ In order to satisfy these requirements, the EU's external activity must be coherent, as has repeatedly been stressed by the various institutions: in a 2014 resolution, the European Parliament emphasised the need for institutional and financial coherence of the EU's external action in order for it to succeed;⁹ in their yearly reports on the implementation of the Common Foreign Security Policy, the Parliament and the Council consistently underline the need for greater coherence in order for the CFSP to be effective.¹⁰ The Commission is also aware of the need for greater coherence to ensure the EU secures its position on the global stage, as demonstrated by its 2006 Communication '*Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*'.¹¹

The need for better coherence in the EU's external action has thus become a recurring theme in the EU external relations narrative and was one of the central aspects of the last Treaty reform.¹² Several institutional changes have been implemented from this perspective, particularly in terms of expanding the role and competences of the High Representative of the Union for Foreign Affairs and Security Policy (hereafter "High Representative") into all areas of EU external relations, making it a member of both the Commission and the Council, and the creation of the European External Action Service.¹³ These reforms were aimed at centralising external action policies and objectives, in the quest for greater coherence.

The most important innovation in this area is the addition of Article 21 TEU, which states in its third paragraph, specifically in relation to coherence, that

"[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect."

The need for coherence in the EU's external action naturally affects the EU's external human rights policy. Articles 3(5) and 21 TEU provide that the EU commits itself to being guided by human rights considerations throughout all its external action.

⁸ There is abundant literature on the EU as a normative actor: see, for example, I. Manners, 'Normative Power Europe: A Contradiction in Terms?' 40 *JCMS* 2002, 235-258; C. Bretherton, J. Vogler, *The European Union as a Global Actor* (Oxfordshire: Routledge 2005); C. Kaddous and R.A. Wessel (eds.), *The European Union as a Global Actor*, Geneva Jean Monnet Working Papers, 2017; J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: OUP 2016).

⁹ European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action, OJ [2017] C 408/21, 30.11.2017.

¹⁰ European Parliament Resolution of 20 January 2021 in the implementation of the Common Foreign and Security Policy – Annual Report 2020.

¹¹ Communication from the Commission to the European Council of June 2006, *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, 08.06.2006, COM(2006) 278 final.

¹² M. Cremona, 'Coherence Through Law: What Difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* 2008, 11-36.

¹³ Article 18 TEU.

The Treaty thus expressly provides that coherence (or consistency)¹⁴ must be ensured by the EU in and between all its policies, including with regard to human rights. The legal force of this provision is, however, questionable. Thus far, the Court of Justice has invoked the requirement of coherence only once, considering that “the European Union must ensure, in accordance with Article 21(3) TEU, consistency between the different areas of its external action, and the duty to inform which the other institutions owe to the Parliament under Article 218(10) TFEU contributes to ensuring the coherence and consistency of that action”.¹⁵ The contested act was annulled not due to its lack of compliance with Article 21(3) TEU but due to its lack of compliance with Article 218(10) TFEU. While its legal force is not fully established,¹⁶ this does not diminish the political importance of coherence, precisely for the purposes of credibility and effectiveness on the international stage.

Following the entry into force of the Treaty of Lisbon, the Council issued the EU's Strategic Framework on Human Rights and Democracy,¹⁷ taking stock of the EU's commitments, its progress and the future challenges regarding the protection and promotion of human rights in third countries. The Strategic Framework is accompanied by five-year Action Plans,¹⁸ one of the deliverables of which is to pursue and achieve greater policy coherence, to be implemented through intensified cooperation between FREMP and COHOM, as well as periodic exchanges with the Member States.

Despite the increasing number of policy documents on coherence, there is no common definition of coherence among the institutions.¹⁹

Given the prolific activity surrounding the coherence of the EU's external policies, this issue has been broadly debated among scholars.²⁰ While this paper does not aim to revisit *in extenso* the various considerations existing in

¹⁴ Note that the terms “consistency” and “coherence” are used as synonyms in existing legal literature. The use of both terms stems from the fact that the English Treaty version uses the word “consistency”, while the French and German versions use “cohérence” and “Kohärenz”, respectively. See C. Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’, in M. Cremona, M. (ed.), *Developments in EU External Relations Law*, (Oxford: OUP 2008), 10-36; M. Cremona, ‘Coherence Through Law: What Difference will the Treaty of Lisbon make?’, *supra* note 12, 11-12.

¹⁵ ECJ, Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435, para. 72.

¹⁶ See, however, J. Langer, W. Sauter, ‘The Consistency Requirement in EU Law’, 24 *Columbia Journal of EU Law* 2017, 39-74. The authors argue that the CJEU increasingly applies a consistency requirement to national policies, which could, in time, create a spillover effect.

¹⁷ See note 2.

¹⁸ The latest Action Plan covers 2020-2024: Council Conclusions on the EU Action Plan on Human Rights and Democracy 2020-2024, 18 November 2020, 12848/20.

¹⁹ T. Lewis, ‘Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies’, deliverable 8.1 of the fp7 FRAME research report (29 September 2014), at 2, available at <<https://www.fp7-frame.eu/wp-content/uploads/2016/08/06-Deliverable-8.1.pdf>>.

²⁰ See, for example, C. Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’, in M. Cremona (ed.), *supra* note 14; C. Portela, K. Raube (eds.), *Revisiting Coherence in the EU Foreign Policy*, 3 *Hamburg Review of Social Sciences* 2008 (special issue); M. Lerch, G. Schwellnus, ‘Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy’, 13 *Journal of European Public Policy* 2006, 304-321; C. Tietje, ‘The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy’, 2 *European Foreign Affairs Review* 1997, 211-233; A.-C. Marangoni,

literature, it is interesting to note how the different dimensions of coherence are theorised, along with the different levels at which it operates. At policy level, coherence should not only consist of the mere absence of contradictions in policies (*negative coherence*) but should also ensure synergies in the latter (*positive coherence*) and guarantee that they are goal-oriented, *i.e.* they pursue the same objective.²¹ Again at this level, coherence issues should also be addressed between the different policies of the EU. At the institutional level, coherence should be guaranteed at different levels: *vertically*, by standardising the policies of the EU with those of the Member States,²² and *horizontally*, either within the policies of the same institution (*intra-institutional coherence*) or between the policies of different institutions (*inter-institutional coherence*).²³

With regard to human rights in EU external policy, the risk of incoherence is high given the somewhat contradictory situation that the EU must pursue the protection and promotion of human rights in all aspects of its external relations, despite the absence of standalone human rights competence for the EU itself. This implies both an institutional as well as a material fragmentation, as different institutions – in addition to the Member States – all have some degree of competence at various levels over external or foreign policy, and thus over guaranteeing respect of human rights. Furthermore, as has been emphasised by scholars, the understanding of coherence of the EU's external policy must consider the normative principles that underlie human rights, namely the principles of indivisibility and universality,²⁴ which are also established by Article 21 TEU. To a certain extent, at the institutional level, this risk can be mitigated by the principles of conferral and of sincere cooperation.²⁵ The situation becomes more problematic when human rights policy intermingles with conflicting considerations, such as geo-strategic, economic or security interests.

This risk is exacerbated due to the intermingling of the EU's external human rights policy with country-specific human rights strategies. Parallel to the adoption of the Strategic Framework, the EU has started to develop, within EU delegations located around the world, country-specific human rights strategies which aim to identify the most urgent local human rights priorities and to guide EU activity with respect to the country involved. These country strategies are not published, as doing so “could be detrimental to their very implementation as this would reveal to the government of their countries’ details of the EU strategy on particular human rights issues”.²⁶ This is in stark contrast with the annual publication by the EU of a human rights country report, summarising the

K. Raube, ‘Virtue or Vice? The Coherence of the EU's External Policies’, 36 *Journal of European Integration* 2014, 473-489.

²¹ See C. Hillion, *supra* note 21, 18-27.

²² M. Cremona, ‘Coherence Through Law: What Difference will the Treaty of Lisbon Make?’, in C. Portela, K. Raube, *supra* note 12 at 16.

²³ See A.-C. Marangoni, K. Raube, *supra* note 21 at 475.

²⁴ See T. Lewis, *supra* note 20, at 18.

²⁵ See M. Cremona, *supra* note 23, 14-16.

²⁶ E. M. Lassen (ed.), ‘In-Depth Studies of Selected Factors which Enable or Hinder the Protection of Human Rights in the Context of Globalisation’, deliverable 2.2 of the fp7 FRAME research report (30 June 2015), at 90, available at <<https://www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-2.2.pdf>>.

EU's public stance on human rights situations in third countries.²⁷ The development of these country-specific human rights strategies has been criticised for several reasons: they are strictly confidential,²⁸ they fail to consider experiences from local civil society organisations,²⁹ and they are considered by the EU to be an internal strategy, not engaging on these issues with the third country in question.³⁰ This opacity prevents the stakeholders from assessing the (in)consistencies between different country-specific human rights strategies.

The problematic consequences of an incoherent policy are two-fold: if they arise at the institutional level, they lead to the inefficient allocation of human, material, and financial resources, thereby creating gaps and overlaps in the EU's external human rights policy. At the policy level, conflicting interests can lead to the unequal application of the EU's standards and procedures to its partners or other third countries based upon their interest in the EU or its Member States, with the risk of being accused of applying double standards,³¹ in turn affecting the EU's credibility on the world stage. In both cases, the effective promotion and protection of human rights by the EU, as well as their universal and indivisible nature, are at risk. Therefore, coherence must not only be ensured, but must also appear to be ensured.³² While it is understandable that different human rights priorities apply to different third countries, all country-specific human rights policies should strive to achieve the same goal, *i.e.* to further the human rights protection in the third country in question. Strategic alliances with third countries, as well as economic and security interests, cannot, and should not, be discounted to this end; however, a coherent approach towards human rights requires that 'any distinction or exception can be justified in principled terms, so that a "rule's" inconsistent application does not necessarily undermine its legitimacy'.³³

Given the above considerations, the following section will analyse and assess the mobilisation of three key instruments in the EU's external human rights toolkit: Human Rights Dialogues, the European Instrument for Democracy and Human Rights, and restrictive measures. Considering these instruments to be paramount to the EU's protection and promotion of fundamental rights, and considering that the imperative of coherence is of great political importance, an

²⁷ These reports are available at <https://eeas.europa.eu/topics/human-rights-democracy/8437/eu-annual-reports-human-rights-and-democratisation_en>.

²⁸ P. Taufar, 'Ensuring the Future of Europe: The Decentring Approach to the EU's Human Rights and Democracy Strategies', *Crossroads Europe*, 21 October 2019, available at <<https://crossroads.ideasoneurope.eu/2019/10/21/ensuring-the-future-of-europe-the-decentring-approach-to-the-eus-human-rights-and-democracy-strategies/>>.

²⁹ HRDN Statement on the Proposed EU Action Plan on Human Rights and Democracy for 2020-2024, 4 May 2020, available at <<https://hrdn.eu/hrdn-statement-on-the-proposed-eu-action-plan-on-human-rights-and-democracy-for-2020-2024/>>.

³⁰ See P. Taufar, *supra* note 29.

³¹ L. Pech, J. Grogan, 'EU External Human Rights Policy' in R. A. Wessel, J. Larik (eds.), *EU External Relations Law. Text, Cases and Materials* (Oxford: Hart Publishing 2020), at 361.

³² M. Russell, 'EU Sanctions: A Key Foreign and Security Policy Instrument', European Parliamentary Research Service Brief (May 2018), at 10, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621870/EPRS_BRI\(2018\)621870_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621870/EPRS_BRI(2018)621870_EN.pdf)>.

³³ See M. Lerch, G. Swellnus, *supra* note 21, 307-308.

assessment of their coherent use would provide a useful contribution to the literature on human rights promotion by the EU in its external relations, as well as on the practical implementation of the notion of coherence.

3. THE IMPERATIVE OF COHERENCE IN THE EU'S HUMAN RIGHTS POLICY IN PRACTICE

The three selected mechanisms are part of what the EU presents as an integrated approach towards human rights, and their combined use is paramount in order for this approach to be coherent. The decision to focus on the aforementioned three mechanisms is not coincidental, but builds on the imperative of effectively and coherently using all policy tools at the EU's disposal, established by Article 21 TEU, official documents and communications of the EU. As such, in 2004, the Council issued basic principles on the use of restrictive measures, underlining its commitment to employ sanctions as part of an integrated and comprehensive approach 'which should include political dialogues, incentives, [and] conditionality'.³⁴ In 2006, the Council issued a note on the mainstreaming of human rights across CFSP and other EU policies. Although predating the changes brought about by the Treaty of Lisbon and the abolition of the pillar structure, the Council puts forward the use of dialogue, technical and financial assistance, along with the follow-up and implementation of UNSC decisions, in order to 'achieve a more informed, credible, coherent, consistent and effective EU human rights policy'.³⁵ The latest EU Action Plan on Democracy and Human Rights is premised by the commitment of the EU and the Member States to 'use the full range of their instruments, in all areas of external action', in order to promote a 'consistent and coherent implementation of the EU's human rights and democracy policy'. Recital 5 of Council Decision 2020/1999 on the new thematic human rights sanctions policy provides that the 'application of such targeted restrictive measures will be consistent with the Union's overall strategy in [the] area [of human rights] and enhance the Union's capacity to promote respect for human rights'. These are just a few selected sources which echo the imperative of coherence between the various human rights policy tools at the disposal of the EU.

To assess the coherence of the EU's external human rights policy, each instrument must be put in its own context and its underlying procedures and objectives must be identified. A common denominator between the three methods is the push to achieve alignment with EU values and the EU's conception of human rights, although the techniques employed to achieve this objective differ. We will analyse Human Rights Dialogues, the HRDTP and restrictive measures in turn, paying special attention to their strengths and weaknesses.

³⁴ Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 7 June 2004, 10198/1/04.

³⁵ Council of the European Union, *Mainstreaming Human Rights Across CFSP and Other EU Policies*, 7 June 2006, 10076/06.

3.1. Human Rights Dialogues

Human Rights Dialogues are top-level bilateral dialogues held on a periodic basis (usually annual or biannual) between EU and third-country officials. The use of dialogue as a tool to further human rights considerations in third countries can be traced back to the negotiations of the 1989 Lomé IV Convention, which included for the first time a human rights conditionality clause, conditioning the execution of the agreement upon respect of the essential elements of the agreement, which explicitly included respect of human rights.³⁶ Given the criticism surrounding the unequal footing of the Parties and therefore the inequality of the human rights clause,³⁷ the European Commission stated in a 1991 *Communication on Human Rights, Democracy and Development Cooperation Policy* that it is open to the 'sensitivity of public opinion', and that the Community seeks to 'promote frank and trusting dialogue on human rights with developing countries, and to keep the channels for that dialogue open as far as possible, even in difficult situations, notably where the aim is to protect specific rights'.³⁸ In 2001, a Commission Communication *on the European Union's role in promoting human rights and democratisation in third countries* underlined the need for greater coherence in the EU's external human rights policy, and proposed to insert human rights considerations in all political dialogues held by the EU with third countries.³⁹ Following that Communication, the Council drafted in 2001 guidelines on human rights dialogues,⁴⁰ which mark the institutionalisation process of this tool. These guidelines were updated in 2008.⁴¹

Several elements of interest are of note in the 2008 guidelines, which reveal the spirit in which the EU aims to conduct such dialogues. Firstly, the Council acknowledges, as noted above, that dialogues – despite being an essential part of the EU's overall strategy – are just one of many measures aimed at implementing its policy on human rights.⁴² Secondly, the decision to initiate a dialogue lies with the Council and is examined on a case-by-case country basis: the practical aims that the EU is seeking to achieve must firstly be defined⁴³ and there must be added value involved in opening a dialogue, which is determined by the foreign government's readiness to cooperate on human rights

³⁶ For a full overview of the evolution of the human rights clause, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP 2005).

³⁷ K. Kinzelbach, 'The EU's Human Rights Dialogue – Talking to Persuade or Silencing the Debate', Paper presented in December 2009 at KFG Conference *The Transformative Power of Europe*, at 3.

³⁸ Commission Communication to the Council and Parliament, *Human Rights, Democracy and Development Cooperation Policy*, 25 March 1991, SEC(91) 61 final, at 1 and 6 resp.

³⁹ Communication from the Commission to the Council and Parliament, *The European Union's role in promoting human rights and democratisation in third countries*, 8 May 2001, COM(2001) 252 final.

⁴⁰ Council of the European Union, *EU guidelines on human rights dialogues*, 3 December 2001, 14469/01.

⁴¹ Council of the European Union, *EU guidelines on human rights dialogues with third countries – Update*, 22 December 2008, 16526/08.

⁴² *Ibid.*, at 2.

⁴³ *Ibid.*, at 7.

issues.⁴⁴ Thirdly, Human Rights Dialogues pursue one of two distinct objectives: either the dialogue is initiated to discuss matters of mutual interest and to enhance cooperation in multinational forums with like-minded countries (the guidelines name the United States of America, Canada, New Zealand and Japan), or it is commenced to discuss the human rights situation in a country which concerns the EU. Finally, the need to maintain the dialogue must be periodically reviewed; if the outcome is ‘not up to the EU’s expectations’ or, inversely, ‘has proved to be successful and has therefore become redundant’, a decision is made to suspend or terminate the dialogue.⁴⁵

The two latter points are not innocuous. The dialogue with third countries “on the basis of broadly converging views” is clearly not aimed at disseminating human rights rules but is an effective way of ensuring strategic voting behaviour in international forums such as the UN.⁴⁶ Furthermore, the fact that the EU considers that some dialogues become redundant due to their success also indicates that there may be a form of strategic selection of partner countries with which it is seeking to dialogue on enhancing cooperation in international forums. This refers back to the introductory premise that the EU’s external relations priorities extend beyond human rights considerations; achieving success on human rights issues alone does not automatically grant a country the status of strategic partner. On the other hand, while the guidelines present the dialogues as being held on a reciprocal basis, allowing the third country also to raise human rights issues in the EU,⁴⁷ the fact that the EU unilaterally decides on the goals to be achieved through this process and on its termination if the expectations are not met, reveals the clear ambition of bringing about changes in the third country in line with the EU’s own standards, rather than engaging in reciprocal dialogue.⁴⁸

Furthermore, Human Rights Dialogues are shrouded in opacity. As mentioned, the EU publishes a thematic report on Human Rights and Democracy worldwide as well as country reports for almost every nation in the world. These reports concern human rights issues on which the EU has worked and cooperated worldwide. As such, the 2019 thematic report underlines that the EU ‘held human rights dialogues and consultations with 39 partner countries’. However, only a handful of these are highlighted. Other than these reports and, in some cases, press statements, there is no comprehensive overview of the different Human Rights Dialogues and no official access to the minutes or agendas of those meetings. While presented as an essential part of the EU’s foreign strategy, it is difficult to gauge the efficiency of these dialogues or to measure their impact on third country behaviour. Empirical research has, however, been con-

⁴⁴ “The assessment will look at developments in the human rights situation, the extent to which the government is willing to improve the situation, the degree of commitment shown by the government in respect of international human rights conventions, the government’s readiness to cooperate with United Nations human rights procedures and mechanisms as well as the government’s attitude towards civil society”, *Ibid.*, at 7.

⁴⁵ *Ibid.*, at 13.

⁴⁶ K. Kinzelbach, see *supra* note 38, 6-7.

⁴⁷ *EU Guidelines on Human Rights Dialogues with Third Countries – Update*, at 6.

⁴⁸ K. Kinzelbach, see *supra* note 38, at 11.

ducted on the infamous EU-China Human Rights Dialogues.⁴⁹ China's brutal handling of the June 1989 Tiananmen Square events provoked worldwide condemnation and led to international sanctions, UN resolutions and the freezing of diplomatic relations.⁵⁰ The Human Rights Dialogue was created as a compromise: in exchange for the cessation of the UN resolutions,⁵¹ China promised to engage in constructive dialogue on human rights with the EU, which further justified continued bilateral cooperation.⁵² There is some consensus that this dialogue amounts to little more than a paper tiger: in the 2018 country report on China, the EU admitted that 'cooperation on civil and political rights is proving increasingly difficult'; in 2017 and in 2019, Amnesty International and other NGOs strongly criticised the EU's continued engagement with China and urged it to halt the negotiations until structural change could be seen in China: '[i]nstead of a forum for promoting rights, the EU-China human rights dialogue has become a cheap alibi for EU leaders to avoid thorny rights issues in other high level discussions.'⁵³ In her book *The EU's Human Rights Dialogue with China*, Katrin Kinzelbach concludes that the human rights dialogue with China has proven to be counter-productive, despite persistence on both sides to continue the talks.⁵⁴

An interesting account is delivered by Max Taylor, who conducted interviews with EU diplomats to gain insight into the rhetoric used on both sides.⁵⁵ He concluded that while China is a non-constructive interlocutor, unwilling to reflect critically on its human rights track record, the EU is equally non-constructive. EU diplomats allegedly adopt an approach in which they consider China to be an unequal partner, exuding a sense of superiority of the EU's interpretation of human rights, which could be '(mis)interpreted by interlocutors as Eurocentric and/or neo-colonial'.⁵⁶

While China is a unique example, given its bargaining power over the EU, this latter observation reflects the EU's attitude towards Human Rights Dialogues, which is that they are intended to disseminate the EU's interpretation of values and human rights, rather than establish a forum for fruitful bilateral exchanges. It is, in the author's opinion, not a stretch to assume that EU diplomats adopt similar attitudes towards other third countries in their respective human rights

⁴⁹ See, for example, M. R. Taylor, 'Inside the EU-China Human Rights Dialogue: Assessing the Delivery of the EU's Normative Power in a Hostile Environment', *Journal of European Integration* 2020; K. Kinzelbach, *The EU's Human Rights Dialogue with China. Quiet Diplomacy and its Limits* (London: Routledge 2014); W. Shen, 'EU-China Relations on Human Rights in Competing Paradigms: Continuity and Change' in T. Christiansen *et al.* (eds.), *The Palgrave Handbook of EU-Asia Relations* (London: Palgrave Macmillan 2013).

⁵⁰ See M.R. Taylor, *supra* note 50, at 4.

⁵¹ The EU arms embargo is, however, still in place.

⁵² See M.R. Taylor, *supra* note 50, at 4.

⁵³ Amnesty International, 'EU: Suspend China Human Rights Dialogue', 18 June 2017, available at <<https://www.amnesty.eu/news/eu-suspend-china-human-rights-dialogue-1052/>>; Amnesty International, 'EU: Make China's Rights Crisis a Summit Priority', 4 April 2019, available at <<https://www.amnesty.eu/news/eu-make-chinas-rights-crisis-a-summit-priority/>>.

⁵⁴ See K. Kinzelbach, *supra* note 50.

⁵⁵ See M. R. Taylor, *supra* note 50.

⁵⁶ *Ibid.*, at 9.

dialogues, if those countries, like China, do not espouse the same human rights culture as the EU, and particularly if they have weaker bargaining power over the EU and an interest in maintaining good relations (e.g. to gain access to the single market). This accords with the manner in which the EU adopts EU human rights country strategies; however, it potentially damages the credibility of the EU as an international actor claiming to hold constructive and mutual dialogue.

3.2. Human Rights and Democracy Thematic Programme

The HRDTP is a financial tool established in 2000 (known, until 2006, as the European Initiative for Democracy and Human Rights, and from 2006 to 2020 as the European Instrument for Democracy and Human Rights (EIDHR)) which allows the EU to fund projects aimed at improving human rights situations and reforming democratic processes.⁵⁷ Through this instrument, the EU allocates funds to civil society organisations in third countries, without consulting or obtaining consent from the national authorities.⁵⁸ In 2014, the Council adopted two regulations, one establishing the EIDHR for the 2014-2020 period⁵⁹ and another laying down common rules and procedures for the implementation of the Union's instruments to finance external action⁶⁰ in order to ensure the integration and consistency of all external action programmes.⁶¹ Under the Multiannual Financial Framework for 2014-2020, the EIDHR's budget was €1.4 billion. In June 2021, the EIDHR was renamed the Human Rights and Democracy Thematic Programme, and now falls under the Global Europe instrument, with a budget of €1.36 billion.⁶²

Contrary to Human Rights Dialogues, the relevance of which is measured on a geographic basis, the HRDTP follows a thematic approach in three areas of intervention: upholding human rights and fundamental freedoms for all; developing, supporting, consolidating and protecting democracy; and promoting effective multilateralism.⁶³

The question for the future will be whether the Global Europe instrument, which now effectively brings together in one tool all of its international aid pro-

⁵⁷ A. Dobрева, 'How the EU Budget is Spent: European Instrument for Democracy and Human Rights', *EPRS Briefing* (September 2015), available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637925/EPRS_BRI\(2019\)637925_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637925/EPRS_BRI(2019)637925_EN.pdf)>.

⁵⁸ Article 12(e) of Regulation no 2021/947 of the European Parliament and the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, *OJ* [2021] L 209/1, 14.06.2021.

⁵⁹ Regulation (EU) no 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, *OJ* [2014] L 77/85, 15.03.2014.

⁶⁰ Regulation (EU) no 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* [2014] L 77/95, 15.03.2014.

⁶¹ See A. Dobрева, *supra* note 58.

⁶² Article 6 of Regulation 2021/947.

⁶³ Annex III to Regulation 2021/947.

grammes, will be able to overcome the challenges faced by its predecessors. Indeed, while the Common Regulation stressed that the thematic approach of the EIDHR should be complemented by other thematic programmes and regional and country-based tools (e.g. European Neighbourhood Instrument), as well as by the other instruments at the disposal of the EU to guarantee the implementation of an effective human rights policy,⁶⁴ the European Court of Auditors, in its 2015 report on EU support for the fight against torture and the abolition of the death penalty, criticised the lack of coherence between the priorities established in the country strategies and the regions in which the EIDHR funds were allocated.⁶⁵ The ECA considered that the global calls for proposals did not focus on the countries where the EU considers the fight against torture and the fight against the death penalty to be a priority. As such, funds were mainly granted to projects in Georgia, South Africa and the DRC, despite the fight against torture and the abolition of the death penalty not being listed as a priority focus in those countries, whereas, conversely, the USA and China country strategies include the fight against the death penalty as a top priority, but their civil societies were not among the top beneficiaries.⁶⁶ The ECA also addressed the fact that the issues raised in the Human Rights Dialogues with the latter two countries did not correspond to the projects financed in both states. Yet Bossuyt et. al. underlined that 'ideally there is a close link between the priorities identified in the dialogue and the activities funded by EIDHR (or other instruments). The virtuous circle can be completed if the lessons learnt with the projects are, in turn, used to "feed" political dialogue.'⁶⁷ The report from the ECA suggests that this has not been the case in several instances.

One explanation for this lack of consistency between the dialogues and the financed projects is perhaps that one of the operational principles of the EIDHR, now HRDTP, is confidentiality, in order to protect the members of civil society who are involved, with only Parliament and the Council having access to all relevant documents, when necessary. This, however, leads to the absence of two, apparently contradictory, indicators: firstly, it is impossible for stakeholders to measure whether the allocated funds effectively lead to an improvement in the human rights situation in the recipient country, and secondly it prevents any measurement of the extent to which the EU practises interventionism, amounting to an export of its own values. With regard to this latter observation, the EU has been criticised for 'prioritising some democratic visions over others', using the EIDHR.⁶⁸ The push of a certain narrative of a 'market model of democracy'

⁶⁴ Recitals 1 and 8 of Regulation 236/2014.

⁶⁵ EU Court of Auditors, *Special Report. EU Support for the Fight against Torture and the Abolition of the Death Penalty*, (Luxembourg: Publications Office of the European Union 2015), available at: <https://www.eca.europa.eu/Lists/ECADocuments/SR15_09/SR_TORTURE_EN.pdf>.

⁶⁶ Ibid., 13-15.

⁶⁷ J. Bossuyt et. al., 'Political Dialogue on Human Rights under article 8 of the Cotonou Agreement', *DG EXPO Study* (2014), at 31, available at: <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/534977/EXPO-DEVE_ET\(2014\)534977_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/534977/EXPO-DEVE_ET(2014)534977_EN.pdf)>.

⁶⁸ M. Kurki, 'Governmentality and EU Democracy Promotion: The European Instrument for Democracy and Human Rights and the Construction of Democratic Civil Societies', 5 *International Political Sociology* 2011, at 349-366.

may, in fact, conflict with the vision of democracy of civil society organisations in the targeted country, thus rendering it more difficult to conduct substantive exchanges on democracy.⁶⁹

3.3. Restrictive measures for human rights violations

The most radical instrument available to the EU to guarantee respect for human rights abroad is the recourse to restrictive measures against third countries and/or individuals who commit violations. This instrument deriving from the Common Foreign Security Policy (CFSP) allows the EU, within its jurisdiction, to impose travel bans or import/export restrictions and to freeze assets, as well as to impose other significant economic measures. These restrictive measures can either be dictated by the UN Security Council, with which the EU is aligned, or decided autonomously by the EU.⁷⁰ The overall aim is to improve the human rights situation and to induce a change in behaviour by the targeted country.⁷¹ Until recently, such sanctions were only imposed on a geographical basis, with regard to the human rights situation in a third country. As such broad sanctions have been criticised for their collateral effect on the human rights of innocent bystanders,⁷² the EU resorts, where possible, to targeted or 'smart' sanctions, by listing the individuals covered by the measures.

In order to be able to react more swiftly to human rights violations worldwide, the EU adopted in December 2022 a new global human rights regime,⁷³ modelled on the US Global Magnitsky Act which allows the USA to impose sanctions for human rights violations and corruption worldwide.⁷⁴ With the new global human rights regime, the Council no longer needs to adopt decisions and regulations on a country-specific basis, sanctioning human rights violators within the specific context of a certain country's situation, but can now pursue a thematic sanctions policy, similar to the one already pursued by the Union with regard to the fight against terrorism,⁷⁵ the fight against the proliferation of

⁶⁹ Ibid., at 366.

⁷⁰ European Commission, factsheet on restrictive measures: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en>.

⁷¹ Ibid.

⁷² N. van der Have, 'The Proposed EU Human Rights Sanctions Regime. A First Appreciation', 30 *Security and Human Rights* 2019, at 3.

⁷³ Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ [2020] L 410/1, 7.12.2020; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ [2020] L 410/13, 7.12.2020.

⁷⁴ N. van der Have, *supra*, note 73.

⁷⁵ Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ [2001] L 344/93, 28.12.2001; Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ [2001] L 344/70, 28.12.2001.

chemical weapons⁷⁶ and the protection of the Union against cyber-attacks.⁷⁷ A regulation and a decision have been adopted in this regard.⁷⁸

The new sanctions regime comprises two types of restrictive measures: financial sanctions and restrictions on movement.⁷⁹ The European Commission stresses in its guidance note on the implementation of the Regulation that while it is intended to 'produce effects in third countries through pressure on the listed persons', it is not meant to 'apply extra-territorially'.⁸⁰ The EU limits the obligations in the Regulation to operators under its jurisdiction; however, this notion is construed broadly. Article 19 of the Regulation provides that the jurisdiction of the EU extends to its territory and airspace; aircrafts and vessels under the jurisdiction of a Member State; natural persons inside or outside the territory of the Union who are a national of a Member State; any legal person, entity or body, inside or outside the territory of the EU, incorporated or constituted under the law of a Member State; and any legal person, entity or body in respect of any business done in whole or in part within the Union. Given that the EU represents a critical transport, financial and trade hub on the international scene, a considerable number of operators thus fall within the jurisdiction of the EU. These operators must comply with the obligation to freeze all assets of listed persons and ensure that they do not make funds or economic resources available to the latter.

This regime does not introduce major changes at the operational level; there are no substantial innovations regarding the methods of applying the sanctions imposed. There is, however, an underlying political objective. Indeed, while the prime objective is to react more quickly to deteriorating human rights situations, smart sanctions against individuals on a thematic basis rather than on a geographic basis – no longer linking human rights violations to the overall situation in a given country – should also allow for the avoidance of diplomatic *faux pas* with important strategic economic partners.⁸¹ This is, of course, not guaranteed.

⁷⁶ EU Council Decision 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ [2018] L 259/25, 16.10.2018; EU Council Regulation No 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ [2018] L 259/12, 16.10.2018.

⁷⁷ Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ [2019] L129/1, 17.5.2019; Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ [2019] L129/13, 17.5.2019.

⁷⁸ Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ [2020] L140/1, 7.12.2020; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ [2020] L140/13, 7.12.2020.

⁷⁹ Articles 3 and 2 of Council Decision 2020/1999 respectively.

⁸⁰ Commission Notice, *Commission guidance note on the implementation of certain provisions of Council Regulation (EU) 2020/1998*, 17 December 2020, C(2020) 9432 final, at 2.

⁸¹ F. Finelli, 'A New Sanctions Regime Against Human Rights Violations', *European Papers*, 1 December 2020, <<https://www.europeanpapers.eu/en/europeanforum/new-eu-sanctions-regime-against-human-rights-violations>>. This is, however, not always guaranteed. As such, the Administration under current US President Biden decided not to impose sanctions on Saudi Crown Prince Mohammed bin Salman for the murder of journalist Jamal Khashoggi, despite US intelligence determining his responsibility. The Administration said it believed that there are "more effective ways" to hold Saudi Arabia accountable, in a manner that also leaves room to work with SA on

After the Council decided in March 2021 to impose sanctions on Chinese officials for the arbitrary detention of Uighur Muslims, based on the new thematic sanctions regime, the Chinese Government swiftly adopted diplomatic countermeasures against several MEPs.

The effectiveness and coherence of the sanctions system has been questioned. Sanctions have successfully contributed to coercing the target third countries in only a limited number of cases.⁸² Furthermore, despite some of the abovementioned sanctions having been in place for a long time, research has shown that 'the likelihood of success decreases as sanctions drag on'.⁸³ It has also been argued that the promotion of democracy through sanctions is mired in instrumental variation, and that some countries face restrictive measures while others do not, despite equally problematic situations arising.⁸⁴ If democracy and human rights considerations are a genuine objective of the EU, they are subordinated to other objectives: maintaining a power position, national security, and vital economic interests.⁸⁵

There are also several instances of divergence between the positions of the different institutions towards third countries, as well as between the position of the EU and that of the Member States, which affect the appearance of a coherent external human rights sanctions policy. Most recently, the European Commission finalised negotiations with China for a future comprehensive investment treaty in December 2020, while three months later the Council imposed restrictive measures on Chinese officials in March 2021.⁸⁶ The European Parliament regularly calls for sanctions against human rights violations in third countries, but those calls are not always heard.⁸⁷

Furthermore, the requirement of unanimity within the Council⁸⁸ in order to impose sanctions often makes it difficult to reach an agreement. For example, in October 2020, the Member States reached a stalemate when Cyprus and Greece refused to endorse sanctions against Belarus for civil rights violations linked to the presidential election, if sanctions were not also imposed on Turkey for their drilling actions in Greek waters.⁸⁹ A compromise was reached and

matters of national interest for the USA: D. Cole, 'Psaki: "More effective ways" to hold Saudi Arabia accountable for Khashoggi's murder than sanctioning crown prince', *CNN*, 28 February 2021, <<https://edition.cnn.com/2021/02/28/politics/saudi-arabia-sanctions-khashoggi-jen-psaki-cnn/tv/index.html>>.

⁸² A. Boogaerts, 'A Symbiotic Relationship? Examining the Convergence of Views Between Practitioners and Scholars on Sanctions Effectiveness', 23 *European Foreign Affairs Review* 2018, at 231.

⁸³ Ibid.

⁸⁴ K. Del Biondo, 'Norms or Interests? Explaining Instrumental Variation in EU Democracy Promotion in Africa', 53 *Journal of Common Market Studies* 2015, 237-254.

⁸⁵ Ibid.

⁸⁶ Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ [2021] L1 99/25, 22.3.2021.

⁸⁷ See, for example, European Parliament Resolution of 21 January 2021 on the human rights situation in Turkey, in particular the case of Selahattin Demirtaş and other prisoners of conscience (2021/2506(RSP)).

⁸⁸ Article 31(1) TEU.

⁸⁹ A. Rettman, 'Cyprus blocking EU sanctions on Belarus', *EUobserver* (11 September 2020).

sanctions were finally imposed on Belarus, but not until the EU was criticised for its failure to display a united front.⁹⁰ Third countries can also co-opt this requirement of unanimity by soliciting Member States individually in order to sway their vote. Most notably, Russia focuses its energies on southern and eastern Member States, such as Greece, Cyprus, or Hungary, to dispel EU unity.⁹¹ Such hijacking of the unanimity rule led Ursula von der Leyen, in her first State of the Union address, to call for the use of qualified majority voting regarding sanctions and human rights;⁹² however, the new global human rights regime has not incorporated this change.

4. CONCLUSION

In this paper, we aimed to shed light on the imperative of coherence of the EU's external human rights policy. We analysed the conduct of human rights dialogues, financing under the HRDTP, and the application of sanctions against third countries for human rights violations. We concluded that these instruments fall prey to considerations and interests which prevent them from being used to their fullest potential, with a view to achieving a single goal: to promote and protect human rights.

Human rights policy is certainly not the only priority in the EU's external relations, which are mired in a complex mix of strategic, protectionary, and altruistic policies. The factsheet on EU relations with China is the best representation of this: 'For the EU, China is simultaneously (in different policy areas) a cooperation partner, a negotiation partner, an economic competitor and a systemic rival.'⁹³ However, by qualifying a human rights policy, defining human rights instruments, and presenting them as priorities at discursive level, the EU opens itself up to scrutiny on the effectiveness and coherence of its human rights policy.

Another open question remains as to the extent to which the EU must act in a similar fashion towards third countries (with problematic track records on human rights) in order to satisfy the proviso of Article 21 TEU. A coherent human rights policy, as noted above, depends on the combined use of the various tools available to the EU. When looking at the data available at the start of 2021⁹⁴ and existing country-based sanctions for human rights violations, there does not seem to be a clear pattern as to how the different instruments are mobilised. As such, the allocation of funds under the HRDTP to civil society in a certain country is independent from the conduct of dialogue with government officials,

⁹⁰ A. Brzozowski, 'EU leaders unblock Belarus sanctions, issue "carrot and stick" warning to Turkey', *Euractiv* (2 October 2020).

⁹¹ A. Osborn, 'Putin steps up drive to kill sanctions amid signs of EU disunity', *Reuters* (Moscow, 29 July 2016).

⁹² State of the Union Address by President von der Leyen at the European Parliament Plenary, 16 September 2020.

⁹³ EEAS, EU-China relations factsheet, June 2020, available at <http://eeas.europa.eu/sites/default/files/eu-china_factsheet_06_2020_0.pdf>.

⁹⁴ Summarised in Table 1.

Table 1. Schematic overview of the combined use of human rights policy tools against countries currently subject to sanctions for human rights violations.

<i>Sanctioned country^a</i>	<i>Financial aid under EIDHR^b</i>	<i>Engaged in bilateral EU human rights dialogue</i>	<i>Engaged in agreement with the EU</i>
Burundi, October 2015	€4.4 million (2016-2020)	Only in the framework of EU-AU HR dialogue, political dialogue reprised from 2021 (last one in 2015)	Party to the Cotonou Agreement ^c
Democratic Republic of Congo, October 2010	Yes (budget unknown)	Only in the framework of EU-AU HR dialogue, political dialogue reprised from 2021 (last one in 2009)	Party to the Cotonou Agreement
Iran, April 2011	No	Since 2016 exploratory dialogues	No
People's Republic of China, June 1989	Yes (budget unknown)	Yes	Agreement on Trade and Economic Cooperation ^d
Libya, February 2011	Yes (budget unknown - overall €345 million)	Only in the framework of EU-AU HR dialogue	No
Nicaragua, October 2019	€6.125 million	No	Party to the EU-Central America Association Agreement ^e
South Sudan, March 2015	Yes	Only in the framework of EU-AU HR dialogue	No
Sudan, March 1994	Yes	EU-AU HR dialogue and informal dialogue	Party to the Cotonou Agreement
Syria, May 2013	Yes	No	No
Venezuela, November 2017	Yes	No	No

^a See EU sanctions map, available at: <<https://www.sanctionsmap.eu/#/main>>

^b Information either obtained from the Human Rights reports, see *supra* note 27, or from the EEAS country fiches: <https://eeas.europa.eu/headquarters/headquarters-homepage_en>.

^c Partnership agreement between the members of the African, Caribbean and Pacific Group of States on the one part, and the European Community and its Member States, on the other part, signed in Cotonou on 23 June 2000; OJ [2000] L 317/3, 15.12.2000.

^d Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, OJ [1985] L 250/2, 19.9.1985.

^e Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ [2012] L 346/3, 15.12.2012.

and such dialogue is also independent from the existence of a pre-existing international agreement between the EU and the country in question. While we must look at the bigger picture of international relations, as well as the specifics of each country, human rights policy should also be coherent in itself. In order to maintain the flexibility required by political and strategic interests, as well as to meet the imperatives of coherence, it is crucial to implement objective and transparent benchmarks and criteria to be engaged in the different policies; this is particularly true for sanctions, where the overzealous recourse to sanctions in a given case and the absence of sanctions in another has been questioned and criticised.⁹⁵ Human rights dialogues should be conducted with both the EU *and* the third country's interests in mind, and accountability mechanisms should be in place for stakeholders. Finally, the improvements that can be brought about in third countries by the combined use of policies should be measured systematically *ex ante* and *ex post*.

The three examined instruments are part of a larger arsenal of tools that can be used by the EU to promote human rights abroad. This arsenal is sufficiently developed: it is up to the EU to use it coherently and harmoniously, marrying its other interests with human rights considerations.

⁹⁵ K. Del Biondo, 'Norms or Interests? Explaining Instrumental Variation in EU Democracy Promotion in Africa', 53 *Journal of Common Market Studies* 2015, 237-254; A. Boogaerts, 'Beyond Norms: A Configurational Analysis of the EU's Arab Spring Sanctions', 14 *Foreign Policy Analysis* 2018, at 409.

EUROPEAN UNION LAW IN EXTRATERRITORIAL STATE OPERATIONS: EXAMINING JUXTAPOSED BORDER CONTROLS AFTER BREXIT

Rohan Sinha*

1. INTRODUCTION

The withdrawal of the United Kingdom of Great Britain and Northern Ireland (UK) from the European Union (EU) marked the first time in its history that the EU lost a Member State. The unprecedented nature of this act has produced numerous unfamiliar situations that have given rise to novel legal questions. One such is the effect of 'Brexit'¹ on the juxtaposed border controls between the UK and France, which appears to have attracted no attention in legal scholarship so far.² However, this particular issue raises interesting practical questions regarding the extraterritorial applicability of EU law.

Brexit effectively altered the status of French border controls in UK territory, creating a rare example of Member State officials carrying out executive functions, which are determined by EU law, on foreign soil. In this new scenario, French border guards in the juxtaposed control zones now occupy an extraterritorial position, not only from France's point of view but henceforth even from the perspective of the EU's *espace juridique*.³ Since the UK is now a third state for the EU, the Franco-British border is an external border of the Union's legal space. France may thus find itself bound by new rules.

This paper explores whether, and to what extent, such rules may bind state organs that are extraterritorially present in the territory of a non-Member State. Particularly, this study examines whether relevant EU legislation applies to French border guards in juxtaposed control zones. It should be noted that the term 'extraterritoriality' is used in multiple ways and carries manifold connotations. Most of the discussions on this topic centre around the geographical reach of laws regulating private persons. However, this paper focuses on legislation regulating the conduct of Member State officials – i.e. the applicability of EU law to extraterritorial state operations.

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¹ In this paper, 'Brexit' refers to the end of the transition period on 31 December 2020.

² However, there has been no dearth of political attention. After the Brexit referendum several French politicians, including today's President Emmanuel Macron, called for the bilateral border agreements to be scrapped or revised. See Lawrence Wakefield, 'Calais mayor wants migrant camps moved to UK: Leaving the EU? Take your borders with you, Natacha Bouchart tells Britain', *Politico*, 25 June 2016, available at <<https://www.politico.eu/article/brexit-eu-referendum-calais-mayor-wants-migrant-camps-moved-to-uk/>>.

³ Strictly speaking, it is inaccurate to speak of extraterritoriality with regard to EU law, as the EU, as an international organisation, has no territory.

The article initially outlines the legal bases for French border controls in UK territory (section 2). In this context, their political significance in the framework of the Brexit process is also touched upon. The applicability of EU law to French officials in UK territory is analysed by first ascertaining the territorial scope of the relevant legal instruments through the lens of literal interpretation (3.1.). The paper attempts to overcome a disparity between the territorial scope of the examined laws and their object and purpose by way of teleological interpretation (3.2.). Additional arguments for the laws' extraterritorial applicability are inferred from the EU's regulation of other forms of extraterritorial border control (3.3.). Finally, two principles are drawn from the Court of Justice of the European Union (CJEU)'s jurisprudence that trigger the extraterritorial applicability of EU provisions. It is argued that these principles are transferable to the case at hand (3.4.). Lastly, the conclusion summarises the findings and highlights the practical need for the EU to definitively regulate extraterritorial state operations.

2. JUXTAPOSED BORDER CONTROLS BETWEEN FRANCE AND THE UK

The extraterritorial border controls that France and the UK conduct on each other's territory are referred to as 'juxtaposed controls'.⁴ Reciprocal agreements provide for French and UK border guards to conduct pre-entry checks on persons before they cross the border or even embark on a journey.⁵ This border control regime between the two states was a by-product of the Channel Tunnel (or Eurotunnel) project – a 50 km railway tunnel from Folkestone to Coquelles which is the only fixed link between the island of Great Britain and the European mainland. The Treaty of Canterbury,⁶ signed between the UK and France in 1986, provided for the construction of the Channel Tunnel and envisaged provisions for border controls to 'enable public authorities to exercise their functions in an area in the territory of the other State where controls are juxtaposed'.⁷

Pursuant to the Sangatte Protocol,⁸ signed between the two states in 1991, a French control bureau was established at Folkestone in British territory and

⁴ See, for example, UK Home Office, 'Fact sheet: The UK's juxtaposed border controls' (11 July 2017), available at <<https://homeofficemedia.blog.gov.uk/2017/07/11/fact-sheet-the-uks-juxtaposed-border-controls/>>; UK House of Lords, European Union Committee, Brexit: refugee protection and asylum, 48th Report of Session 2017-19 – published 11 October 2019 – HL Paper 428, para. 86, available at <<https://publications.parliament.uk/pa/ld201719/ldselect/lducom/428/42806.htm>>.

⁵ For details, see G. Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Leiden/Boston: Martinus Nijhoff Publishers 2010), 411-417.

⁶ Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link with Exchange of Notes, Canterbury, 12 February 1986 (Treaty of Canterbury), 1497 UNTS p. 25792; UKTS 015/1992: Cm 1827.

⁷ Treaty of Canterbury, Article 4(3).

⁸ Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning Frontier Controls and Policing,

a corresponding UK bureau at Fréthun in French territory.⁹ Officials of the respective other state are authorised to carry out border controls within designated control zones. Within these zones, the border guards apply their state's frontier control laws exactly as they would in their own territory.¹⁰ Accordingly, a passenger at the Folkestone Eurotunnel terminal seeking to travel to France by train is legally still in the UK but subject to controls by French officers enforcing French laws.¹¹ In 2001, pursuant to the Additional Protocol to the Sangatte Protocol,¹² further juxtaposed control bureaux were set up at the British railway stations of London-Waterloo, London-St. Pancras and Ashford as well as in the French railway stations of Paris-Gare du Nord, Calais and Lille-Europe.¹³ These juxtaposed border controls were further expanded with the 2004 Treaty of Le Touquet.¹⁴ This agreement established extraterritorial immigration controls by the two countries at their respective sea ports.¹⁵ Hereby French officers are authorised to carry out immigration controls in the port of Dover.¹⁶

As all of these agreements are bilateral treaties, the border control regime put in place between the UK and France remains legally unaffected by Brexit. However, the politically sensitive issue of migration control may call into question the *status quo* of the instruments.¹⁷ Neither the EU-UK Withdrawal Agreement¹⁸ nor the EU-UK Trade and Cooperation Agreement¹⁹ (TCA) include references to the Franco-British border. Only a legally non-binding 'Joint Political Declaration on Asylum and Returns' was adopted alongside the TCA.²⁰ Although the declaration notes that the TCA does not include provisions on asylum and immigration-related matters, the parties nonetheless acknowledge 'the importance

Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link, Sangatte, 25 November 1991 (Sangatte Protocol), UKTS 070/1993: Cm 2366.

⁹ Ibid., Article 5(1).

¹⁰ Ibid., Article 9.

¹¹ See also for the corresponding UK perspective: UK House of Commons, Committee on Home Affairs, Appendices to the Minutes of Evidence, Annex 16, 31 January 2001, available at <<https://publications.parliament.uk/pa/cm200001/cmselect/cmhaff/163/163ap09.htm>>.

¹² Additional Protocol to the Sangatte Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the Establishment of Bureaux responsible for Controls on Persons travelling by train between the United Kingdom and France, 29 May 2000 (Additional Protocol to the Sangatte Protocol), UKTS 033/2002: Cm 5586.

¹³ Ibid., Article 2.

¹⁴ Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea, 4 February 2003 (Treaty of Le Touquet), UKTS 018/2004: Cm 6172.

¹⁵ Ibid., Articles 1(2), 1(4) and 2(a).

¹⁶ The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, Article 2, Schedule 1, available at <<https://www.legislation.gov.uk/uksi/2003/2818/made>>.

¹⁷ UK House of Lords, *supra* note 4, para. 88.

¹⁸ 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 C 384 I, 12.11.2019, p. 1-177.

¹⁹ 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, OJ [2021] L 149/10, 30.4.2021.

²⁰ OJ [2020] L 444/1477, 31.12.2020.

of good management of migratory flows, and recognise the special circumstances arising from the juxtaposed control arrangements (...)' . The parties further 'take note of the United Kingdom's intention to engage in bilateral discussions with the most concerned Member States to discuss suitable practical arrangements on asylum, family reunion for unaccompanied minors or illegal migration, in accordance with the Parties' respective laws and regulations'.

It is not known if the UK and France will attempt to reach a new agreement. Until then, legal certainty requires clarity on the applicable legal framework as a matter of practical importance. Despite their uncertain future, juxtaposed border controls are likely to remain in place until new agreements are concluded. Until then, France must be aware of the new legal framework within which its border guards must operate.

3. APPLICABILITY OF EU LAW TO FRENCH OFFICIALS IN UK TERRITORY

Articles 4(3) of the Treaty on the European Union (TEU)²¹ and 291(1) of the Treaty on the Functioning of the European Union (TFEU)²² state that the Member States must take any measures required to fulfil obligations arising from the Treaties and from Union acts. All EU law is thus fully binding on all Member States. Not only the national courts, but every single State organ must comply with Treaty provisions and secondary law.²³ French border guards are state officials of the executive branch and therefore obliged to follow EU law when exercising their duties. Whether this binding force of EU law applies to them only in French territory, or even when acting abroad, requires an examination of the geographical scope of EU law.

Before examining selected Regulations and Directives relevant to border controls, the geographical framework of the Treaties must be established. The legal basis of secondary law, which includes Directives and Regulations, lies in the Treaties. Although the territorial scope of secondary law must be ascertained for every piece of legislation respectively, the general provisions of the Treaties remain relevant. As institutional acts adopted on the basis of the Treaties, the territorial scope of secondary law cannot exceed the territorial scope set out by the Treaties from which they derive their powers. In principle, secondary law thus applies to the same geographical area as the Treaties.²⁴ Applying secondary law to situations not covered by the Treaties would render those acts *ultra vires*.

²¹ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13-390.

²² Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47-390.

²³ ECJ, Case C-103/88 *Fratelli Constanzo* [1989] ECLI:EU:C:1989:256, paras. 30-31.

²⁴ ECJ, Case 61/77, *Commission v. Ireland* [1978] ECLI:EU:C:1978:29, para. 46.

3.1. Textual interpretations

3.1.a. *Non-territorial scope of the Treaties*

Article 52(1) TEU provides:

‘(1) The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
(2) The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.’

Given that the Treaties still require amendments to take account of Brexit,²⁵ this provision can be understood in one of two ways.

On the one hand, Article 52 TEU could reflect the general international law on treaties, whereas according to Article 29 of the Vienna Convention on the Law of Treaties (VCLT)²⁶ ‘a treaty is binding upon each party in respect of its entire territory’, unless a different intention appears. These ‘different intentions’ can then be seen to be expressed in Article 355 TFEU, which specifies the Treaties’ applicability in the Member States’ overseas territories. On this basis, France is bound by EU law in its metropolitan territory as well as in its overseas *départements* listed in Article 355(1) TFEU.²⁷ Since the juxtaposed control zones in UK territory lie outside these areas, EU law would not apply to France within such zones. On the other hand, Article 52 TEU can be understood to enumerate the addressees of the Treaties, as distinct from demarcating their field of application.²⁸ The contracting states are listed without any reference to territory, which means that they are bound by the Treaties at all times, even when acting outside their territory. The obligations incurred are therefore coupled with state activity and do not lose their validity when Member State officials cross their country’s border. This reading can be derived from the wording ‘[t]he Treaties shall apply to [the Member States]’ that was chosen instead of a

²⁵ On this point, and on other amendments required, see: F. Fabbrini, ‘How Brexit Opens a Window of Opportunity for Treaty Reform in the EU’, *spotlight Europe* 2016/01, p. 3, available at <<https://www.bertelsmann-stiftung.de/en/publications/publication/did/how-brexite-opens-a-window-of-opportunity-for-treaty-reform-in-the-eu/>>.

²⁶ Vienna Convention on the Law of Treaties, 1155 UNTS p. 331.

²⁷ The latest overseas *département* is Mayotte, see: Council Directive 2013/61/EU of 17 December 2013 amending Directives 2006/112/EC and 2008/118/EC as regards the French outermost regions and Mayotte in particular.

²⁸ V. Moreno-Lax and C. Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’, in S. Peers, A. Ward, J. Kenner and T. Hervey (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing: Oxford, 1st ed., 2014), 1657-1683 at 1664, para. 59.15.

formulation such as ‘*in* [the Member States]’ or any other terminology that would have been closer to the phrasing of Article 29 VCLT.

It can also be argued that paragraph 2 of Article 52 TEU underlines the provision’s non-territorial concept. By stating that the territorial scope of the Treaties is specified in Article 355 TFEU, it can be assumed that paragraph 1 contains no reference to territory. However, since Article 355 TFEU refers back to Article 52 TEU as ‘relating to the territorial scope of the Treaties’, this argument is weak.

Even so, it remains preferable to reject the territorial reading of the provision. Otherwise, Member States can absolve themselves from their obligations under EU law by taking action outside their borders. This would create a legal vacuum for extraterritorial state operations and potentially open the door to lawless acts. Such a prospect certainly contravenes the spirit of the Treaties that envision Member States to implement Union law completely and effectively.

3.1.b. *Territorial scope of the applicable secondary law*

Among the many checks that French border guards conduct in UK territory, immigration and customs controls are the most important. How these controls are to be conducted is mainly determined by EU legislation. Selected rules on asylum (3.1.b.i.) and customs control (3.1.b.ii.) will be examined for their *ratione loci*. The chosen instruments illustrate both the extent and limits to which EU law can apply extraterritorially by interpretation. The *ratione loci* of these instruments is not only relevant for directly applicable Regulations but also for Directives that require transposition into national law by the Member States. If a Directive does not apply extraterritorially, the actions conducted abroad no longer lie within its scope. This would mean that the Member State’s extraterritorial conduct would not be subject to judicial review by the CJEU. Furthermore, the EU Fundamental Rights Charter²⁹ would not apply to extraterritorial state conduct that is not determined by EU law, as the Member States would not be ‘implementing Union law’, as required by Article 51(1) of the Charter.

3.1.b.i. *EU asylum law*

The rules of the Common European Asylum System are no longer applicable in the UK post-Brexit. This creates a new legal situation. As the UK becomes a ‘third country’, laws that did not previously apply to France may now be applicable. When considering a scenario where French officers in UK territory encounter persons seeking international protection, must the French border guards carrying out juxtaposed controls comply with the obligations imposed by EU law when receiving an application for asylum?

The Common European Asylum System comprises Directives and Regulations that set out common standards and procedures for cooperation between the Member States, thus ensuring that asylum seekers are treated equally in

²⁹ Charter of Fundamental Rights of the European Union, OJ [2021] C 326, 26.10.2012, p. 391-407.

an open and fair system wherever they make their application.³⁰ Directive 2013/32/EU (Asylum Procedures Directive) aims to establish common procedures for granting and withdrawing international protection.³¹ The purpose of Directive 2013/33/EU (Reception Conditions Directive) is to establish standards for the reception of applicants for international protection.³² Regulation No. 604/2013 (Dublin-III Regulation)³³ is directly applicable and establishes the state responsible for examining the application of asylum seekers.³⁴

By literal interpretation, none of these instruments can bind French officials in UK territory.³⁵ It might first be argued that any extraterritorial scope of the Asylum Procedures Directive and the Reception Conditions Directive is entirely excluded by their identical Articles 3(2), which provide that the respective Directives shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States. This could lead to the assumption that Member States' extraterritorial presence *per se* should not fall under the ambit of the Directives. However, the express mention of 'representations of Member States' arguably implies that this provision refers only to diplomatic and consular premises. After all, these are the standard state representations abroad. This is further emphasised by the reference to 'diplomatic asylum' in the same provision.

The Directives could cover asylum applications made at juxtaposed control zones by virtue of their partly identical Articles 3(1), which essentially provide for the scope of the Directives to extend to all applications for international protection made on the 'territory, including at the border, in the territorial waters or in the transit zones' of the Member States. Similarly, the Dublin Regulation provides in Article 3(1) that 'Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones'. From these formulations, the French control zones in the UK could qualify either as a 'border' or as a 'transit zone'.

³⁰ See the description of the Common European Asylum System by the European Commission, available at <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en>.

³¹ Article 1, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ [2013] L 180/60, 29.6.2013.

³² Article 1, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. OJ [2013] L 180/96, 29.6.2013.

³³ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin-III Regulation), OJ [2013] L 180/31, 29.6.2013.

³⁴ On the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ [2011] L 337/9, 20.12.2011 and its arguably territorial scope see M. den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing: Oxford 2011), 203-204; H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers: Leiden 2006), 209-211.

³⁵ See also, Heijer, *supra* note 34, 203; Battjes, *supra* note 34, 209.

However, a particular area does not become a border just because border controls are carried out there. Borders are, after all, fixed physical demarcations between states which do not change according to the location of the activities of state organs. French controls in the UK are deliberately conceived to take place beyond the physical border, which lies in the middle of the Channel Tunnel, as drawn by the 1986 Treaty of Canterbury.³⁶ The French control areas do not, therefore, qualify as a 'border' in the sense of the Directives.

The term 'transit zone' is ambiguous and not clearly defined anywhere. Other EU legislation refers instead to 'international transit area'.³⁷ The ordinary understanding of the term points to the areas of international airports which lie after border exit controls and/or before border entry controls.³⁸ However, transit zones have also been set up outside of airports. For example, Hungary established transit zones at its border to serve as a place of temporary residence for persons seeking international protection.³⁹ Asylum applications can only be lodged within those zones.⁴⁰ Since the CJEU applied EU law with reference to 'transit zones' in this case, the term is not limited to international airports.⁴¹ Generally speaking, transit zones can thus be understood to be any sort of 'grey area' in which a person has neither completely entered nor completely left the country. In any case, it is agreed that these areas remain a full part of state territory and jurisdiction.⁴² Thus, despite their special legal status, their nature is non-extraterritorial.⁴³ As French juxtaposed controls are extraterritorial, they do not fall under the standard concept of transit zones situated within state territory.

Therefore, *stricto sensu*, French border guards in the UK are not bound by these instruments of the European Asylum System.

3.1.b.ii. *EU customs law*

Brexit has also placed the UK outside of the EU Customs Union. This may have led to the applicability of new rules on customs controls to extraterritorially present French border guards. Since 1 January 2021, all goods entering the customs territory of the EU from the UK are subject to EU customs laws. In this context, the question is whether these customs laws can be enforced by French border guards in the framework of their pre-entry checks in UK territory. Two Regulations will serve as an illustration.

³⁶ Article 3, Treaty of Canterbury.

³⁷ See, for example, Articles 1(3), 2(2)(b), 2(5) of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ [2009] L 243/1, 15.9.2009 and Article 15 of the Dublin-III Regulation.

³⁸ See, for example, Articles 3, 26 of the Visa Code.

³⁹ Article 15/A(1) of the 2007. évi LXXXIX. törvény az államhatárról (Law on the State borders).

⁴⁰ Article 80/J(1) of the 2007. évi LXXX. törvénya menedéjogról (Law on Asylum).

⁴¹ ECJ, Case C-808/18, *Commission v. Hungary* [2020]

ECLI:EU:C:2020:1029, paras. 10, 11, 14, 18, 22, 26.

⁴² ECJ, Case C-17/16, *Oussama El Dakkak* [2017] ECLI:EU:C:2017:341, paras. 24, 27.

⁴³ See also, Opinion of Advocate General, Case C-17/16, *Oussama El Dakkak* [2016] ECLI:EU:C:2016:1001, paras 26, 27 and citing ECtHR, *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, para. 52.

Regulation No. 608/2013⁴⁴ sets out the conditions and procedures for action by the customs authorities concerning goods suspected of infringing an intellectual property right. Particularly, the regulation applies to goods ‘entering or leaving the customs territory of the Union’.⁴⁵ Goods passing French juxtaposed control zones are destined to enter the customs territory of the Union. However, strictly speaking, they only enter (‘entering’) the customs territory after crossing the border to France. The chapeau of the Regulation’s Article 1 sets out the scope of the regulation as applying, *inter alia*, to goods suspected of infringing intellectual property rights that are subject to customs control ‘within the customs territory of the Union’.⁴⁶ French border guards in the UK are not, however, within the customs territory, but outside of it. The scope of the Regulation does not, therefore, cover customs controls in the juxtaposed control zones.

Similarly, Regulation No. 2018/1672⁴⁷ provides for a system of controls on cash entering or leaving the Union. Article 3 obliges carriers of cash worth 10 000 EUR or more to declare that cash ‘to the competent authorities of the Member State through which they are entering (...) the Union’. To verify compliance with this obligation, Article 5(1) provides that ‘the competent authorities shall have the power to carry out controls on natural persons, their luggage and their means of transport (...)’. ‘Entering the Union’ is defined as ‘coming from a territory which is outside the territory covered by Article 355 TFEU to the territory which is covered by that Article’.⁴⁸ By this definition, cash subject to control in the French control zones is not entering the Union. Rather, this cash is coming from the UK, which is outside the territory of Article 355 TFEU and would be controlled in the control zones, which are still in UK territory. As with Regulation 608/2013, the cash only enters the Union after crossing the physical border into the EU’s Member State, France. The Regulation’s scope thus does not include controls in the juxtaposed control areas.

3.2. Teleological extension of the territorial scope

This section will demonstrate that the foregoing argument, wherein a literal interpretation of the chosen legislative instruments *stricto sensu* does not allow them to bind French officials in UK territory, is at odds with the object and purpose of the instruments. This discrepancy, however, can be overcome by teleological interpretation. All EU legislation must be interpreted to effectively fulfil its purpose. Preventing any impairment of the ‘full force and effect’ of Union

⁴⁴ Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003, OJ [2013] L 181, 29.6.2013.

⁴⁵ Article 1(1)(b).

⁴⁶ The customs territory principally comprises of the territories of the Member States, see Article 3 of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ [1992] L 302, 19.10.1992.

⁴⁷ Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No. 1889/2005, OJ [2018] L 284, 12.11.2018, 6-21.

⁴⁸ Article 2(1)(b).

law is one of the cornerstones of the CJEU's jurisprudence and can even amount to Member States' national law being set aside.⁴⁹

The purpose of the Asylum Procedures Directive is to establish common procedures for granting and withdrawing international protection.⁵⁰ However, these procedures can deviate if certain locations in which asylum applications are lodged do not fall under the Directive's ambit. Persons seeking asylum should be offered the same level of treatment no matter the Member State in which they lodge their application.⁵¹ Consequently, it should not matter which Member State's authorities handle the application. Any asylum applications lodged in the control zones to French officers must therefore be handled according to the Procedures Directive so as not to undermine its purpose. This is also underscored by the Directive's Recital (26), which explicitly states that effective access to the asylum examination procedure should be ensured by the 'officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks'.

Similarly, the Reception Conditions Directive, which lays down standards for the reception of applicants, aims to ensure equal treatment of applicants throughout the Union and should therefore 'apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants'.⁵² A territorial confinement of the Directive would contravene the formulation 'in all locations'. Equal standards would not apply for applications made in the French control zones if they were assumed to fall outside the Directive's scope.

The aim of the Dublin-III Regulation is to provide greater legal certainty and protection to asylum seekers and to ensure the asylum system's efficiency. This would not be fully achieved unless it also applied to applications made in the juxtaposed control zones.

Regulation No. 608/2013 concerning customs enforcement of intellectual property rights aims to contribute to an internal market which ensures right-holders effective protection and fuels creativity and innovation, while at the same time providing customers with reliable and high-quality products.⁵³ The Regulation recognises that enforcing intellectual property rights at the border is an efficient way to quickly and effectively provide legal protection to the right-holder as well as the users and groups of producers.⁵⁴ The efficient enforcement opportunity of border controls would not be exhausted if juxtaposed control zones were excluded from the Regulation's scope. The goals laid out in the regulation would not be achieved to their fullest potential.

⁴⁹ ECJ, Case C-106/77, *Simmenthal SpA* [1978] ECLI:EU:C:1978:49, para. 22; ECJ, Case C-213/89, *Factortame* [1990] ECLI:EU:C:1990:257, paras. 20, 21.

⁵⁰ Article 1, Asylum Procedures Directive.

⁵¹ Recital (8), Asylum Procedures Directive.

⁵² Recital (8), Reception Conditions Directive.

⁵³ Recital (8), Regulation No. 608/2013.

⁵⁴ Recital (4), Regulation No. 608/2013.

Regulation No. 2018/1672 on controls on cash entering or leaving the Union aims, *inter alia*, to prevent money laundering and terrorist financing.⁵⁵ Recital (4) states that the interpretation of the Regulation should ensure that it has 'the broadest possible scope of application and that no areas would be exempt from its application and present opportunities to circumvent applicable controls'. A strictly literal interpretation excluding juxtaposed control zones from the Regulation's scope would be neither the broadest possible interpretation nor prevent the exemption of certain areas. Rather, French control zones in UK territory could potentially be used as loopholes to circumvent controls.

All the legislative instruments can only exercise full force and effect when they apply to French control zones that lie outside the territory of a Member State. Territorial limitations would hamper the achievement of the laws' regulatory goals.

3.3. Applicability of EU law to extraterritorial border controls

Further arguments to extend the applicability of the instruments extraterritorially can be inferred from additional EU legislation relating to border controls. Numerous provisions testify that extraterritorial border controls are no blind spots of the EU and that the extension of Union law to these situations is no aberration.

3.3.a. Extraterritorial applicability of the Schengen Border Code

Most EU Member States have abolished frontier checks between them by establishing the 'Schengen area'. Matters of border-crossing at internal and external borders are extensively regulated by the Schengen Border Code (SBC),⁵⁶ which recognises the possibility of extraterritorial border controls. For example, the SBC provides for checks to be carried out at railway stations in the territory of a third country.⁵⁷ By including such extraterritorial border controls within its scope of application, the SBC defines its own reach as extending beyond Member State territories.⁵⁸

In terms of the SBC, the juxtaposed border controls conducted by France in the UK, which was never part of the Schengen *acquis*, can be defined as 'shared border crossing points' located on third-country territory.⁵⁹ For the purpose of the SBC, 'any check carried out by Member State border guards in a shared

⁵⁵ Recital (17), Regulation No. 2018/1672.

⁵⁶ Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ [2016] L 77/1, 23.3.2016.

⁵⁷ Annex VI, paras. 1.2.1-1.2.2.; see also Article 3.1.1. for maritime checks on the territory of third countries. V. Moreno Lax, *Accessing Asylum in Europe* (2017), 296 also views air border controls to be able to take place extraterritorially as per paras. 2.1.3. and 2.2.1. SBC.

⁵⁸ *Ibid.*, 296; Heijer, *supra* note 34, at 199.

⁵⁹ Article 2(9) SBC; I am thankful to Dr Tamás Molnár for drawing my attention to this detail of the SBC.

border crossing point located on the territory of a third country shall be deemed to be carried out on the territory of the Member State concerned. Member State border guards shall exercise their tasks in accordance with this Regulation (...).⁶⁰ The extraterritorial applicability of the SBC thus operates through a legal fiction whereby border guards acting in a third country are viewed to be acting territorially. Therefore, questions of extraterritoriality do not need to be raised for every single provision.

When applying the rules of the SBC, Member States shall act 'in full compliance with relevant Union law'.⁶¹ France carries out pre-entry checks in UK territory in accordance with the Schengen rules.⁶² The performance of Schengen checks therefore does not preclude, but instead promotes, the applicability of other relevant EU law.

3.3.b. *Immigration liaison officers*

Another form of pre-entry control used by the Member States is the secondment of immigration liaison officers (ILOs) to foreign countries. Sometimes referred to as 'document advisers', they are tasked with preventing illegal entries into the EU by providing advice and training on immigration matters to private air carriers as well as to the host country's border control authorities.⁶³ ILOs may also directly assist the host country in immigration-related decisions on individual cases.⁶⁴ This form of cooperation was originally established by an international treaty between seven Member States⁶⁵ and has since also been adopted by the EU.⁶⁶ The relevant EU law recognises that ILOs, who are extra-

⁶⁰ SBC, Annex VI, 1.1.4.3.

⁶¹ Article 4 SBC. Article 4, despite being entitled 'Fundamental Rights', is arguably not limited to those rights, as is evident from the text of the provision.

⁶² France, Sénat, Session Ordinaire de 2003-2004, Annexe au procès-verbal de la séance du 8 octobre 2003, Rapport, Fait au nom de la commission des Affaires étrangères, de la défense et des forces armées (1) sur le projet de loi autorisant l'approbation du traité entre le Gouvernement de la République française et le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord relatif à la mise en oeuvre de contrôles frontaliers dans les ports maritimes de la Manche et de la mer du Nord des deux pays, p. 6, available at <<http://www.gdr-elsj.eu/wp-content/uploads/2015/12/5.-accords-du-touquet.pdf>>. See also the border crossing points in UK territory designated by France in: Update of the list of border crossing points referred to in Article 2(8) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ C 316, 28.12.2007, p. 1-37; UK Home Office, Factsheet: the juxtaposed border controls, *supra* note 4.

⁶³ Articles 20, 21 of the Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Prüm Convention), 2617 UNTS p. 3; Article 3(5), Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), OJ [2019] L 198/88, 25.7.2019.

⁶⁴ Article 3(6) Regulation 2019/1240; For criticism, see Heijer, *supra* note 34, 178.

⁶⁵ Prüm Convention, *supra* note 63.

⁶⁶ Regulation (EU) 2019/1240, *supra* note 63.

territorially present Member State officers, are bound by Union law when acting abroad.⁶⁷ Furthermore, the SBC arguably encompasses the work of ILOs.⁶⁸

3.3.c. *Frontex operations in third countries*

The European Border and Coast Guard Agency (Frontex) is responsible for controlling the external borders of the Schengen Area. All officers deployed on Frontex operations work under the command and control of the authorities of the country hosting the operation. In 2016 and 2019, Frontex's mandate was expanded and since includes the possibility to conduct operations in the territory of third countries.⁶⁹ When Frontex carries out such extraterritorial border controls, the EU Agency and the Member State officials are bound by Union law as if they were present within the Union *acquis*.⁷⁰

3.4. **Transfer of CJEU jurisprudence on extraterritoriality**

The jurisprudence of the CJEU offers no clear answer to the question of whether EU law can bind Member State organs extraterritorially. This is because the Court has never been concerned with the extraterritorial presence of Member State officials exercising their executive functions on foreign soil. However, the existing case law on extraterritoriality establishes some general principles, which are transferable to the case of extraterritorial border controls.

3.4.a. *Applicability of national law as a trigger for extraterritorial application*

The CJEU has consistently held that the geographical application of the Treaties, as defined in Article 52 TEU and Article 355 TFEU, does not preclude Treaty provisions from applying to circumstances outside the EU, as long as there is a sufficient link to the territory. This has been elaborated instructively in several cases concerning employment contracts. The common denominator in all these cases is a link to national law. When an extraterritorial situation falls under the regulatory authority of a Member State, it can be seen as being 'located within the territory' of the EU. After all, when situations abroad are subject to the law of a Member State, the legal effects of the regulated circumstances

⁶⁷ Article 3(2), Regulation 2019/1240.

⁶⁸ V. Moreno Lax, *supra* note 57, 138-139.

⁶⁹ Article 54, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ [2016] L 251/1, 16.9.2016; Article 74, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ [2019] L 295/1, 14.11.2019.

⁷⁰ Article 71(3), Regulation 2019/1896.

always take place within EU territory.⁷¹ The cases demonstrate that these legal effects can be manifold, encompassing the Member State's liabilities, social security scheme, income tax and judicial system. Also, if the applicable Member State's law normally falls within the ambit of the EU Treaties, Union law conjointly extends to the extraterritorial situation covered by the Member State's law.⁷²

In *Boukhalfa*, the Court of Justice had to decide whether the prohibition of discrimination based on nationality (which is now Article 18 TEU) applied to a Belgian national employed at Germany's Embassy in Algeria under a contract subject to Algerian law. As the contract was entered into in accordance with German law, provided for dispute settlement before German courts and included the plaintiff in the State social security system,⁷³ the prohibition of discrimination based on nationality was deemed applicable.⁷⁴ The Court specifically rejected Germany's argument that Community law was not applicable as its sphere of application was limited to the territory of the Member States by what is now Article 355 TFEU (ex. 227 EC). The Court held that the provision defining the geographical application of the Treaty 'does not, however, preclude Community rules from having effects outside the territory of the Community'.⁷⁵

Prodest was a case concerning the application of the principle of non-discrimination to workers' social benefits. The CJEU held that when a Belgian national employed by a French company was temporarily posted to Nigeria, a sufficiently close link to the Community territory could be found, *inter alia*, in the fact that the employee was engaged by a company established in a Member State and was therefore insured under the social security scheme of that state.⁷⁶ The Court found that activities temporarily carried out outside the territory of the Community are not sufficient to exclude the application of the principle of non-discrimination.⁷⁷

In *Lopes da Veiga*, the Court reiterated that persons pursuing professional activities outside Community territory remain within the scope of European law if the legal relationship of employment can be located within Community territory or retains a sufficiently close link with that territory.⁷⁸ The Court held that the Treaty's provision of free movement applied to a Portuguese national (at a time when Portugal was not yet a Member State) employed on Dutch vessels on the high seas because he was employed by a Dutch company, insured under

⁷¹ See also ECJ, Case 36/74, *Walrave and Koch* [1974] ECLI:EU:C:1974:140, para. 24: 'By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community'.

⁷² See Heijer, *supra* note 34, 193.

⁷³ ECJ, Case C-214/94, *Boukhalfa* [1996] ECLI:EU:C:1996:174, para. 16.

⁷⁴ *Ibid.*, paras. 17, 22.

⁷⁵ *Ibid.*, para. 14.

⁷⁶ ECJ, Case C-237/83, *SARL Prodest* [1984] ECLI:EU:C:1984:277, para. 7.

⁷⁷ *Ibid.*, para. 6.

⁷⁸ ECJ, Case C-9/88, *Mário Lopes da Veiga* [1989] ECLI:EU:C:1989:346, para. 15.

the social security system of the Netherlands, paid taxes in that country, and his employment contract was subject to Dutch law.⁷⁹

3.4.b. *Jurisdictional control as a trigger for extraterritorial application*

Jurisdiction, as understood in human rights law (i.e. as power, authority or control),⁸⁰ can also be identified as a trigger for extraterritorial application, in accordance with CJEU case law. When a Member State exercises sovereign rights over a particular area, it is deemed capable and, concomitantly, is required to apply EU law in that area. This is generally self-evident for a state's territory, which is usually under the full control of that state.⁸¹ Moreover, this principle has been extended to extraterritorial areas, insofar as the state has a comparable degree of control in such areas.

In *Kramer*, the CJEU held that EU rules on the conservation of biological resources of the sea extend to fishing on the high seas 'in so far as the Member States have similar authority under public international law'.⁸² *Mondiet* confirmed that 'with regard to the high seas, the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the state whose flag the vessel is flying or in which it is registered'.⁸³

The case *Commission v. UK* concerned the geographical scope of transposition of the Habitats Directive⁸⁴ by the UK Government. The Directive's aim 'is to contribute towards ensuring biodiversity [...] in the European territory of the Member States to which the Treaty applies'.⁸⁵ The UK had only transposed the Directive in relation to its natural territory and territorial waters. The Court held that the instrument should also be implemented in the exclusive economic zone because the UK exercised sovereign rights in that zone.⁸⁶

⁷⁹ Ibid., paras. 16, 17, 19.

⁸⁰ On this meaning of jurisdiction, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press 2011), 30-34, 39; S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* 2012, 857-884 at 862-863, 871. On jurisdiction in general international law, understood as a state's legislative, judicial and executive competence, see for example, M. Akehurst, 'Jurisdiction in International Law', 46 *The British Yearbook of International Law* 1972-73, 145-257; C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2nd ed., 2015), 9-10.

⁸¹ In exceptional cases, a state does not have full control over its territory, for example, Georgia in the Abkhazia and Tskhinvali/South Ossetia regions, Moldova for the Transnistria region, and Ukraine for Crimea. In the first two cases, Article 429(2) of the Association Agreement between the EU and Georgia and Article 462(2) of the Association Agreement between the EU and Moldova exclude those regions from the territorial scope of the treaties.

⁸² ECJ, joined cases 3, 4, and 6/76, *Cornelis Kramer et. al.*, [1976] ECLI:EU:C:1976:114, para. 30/33.

⁸³ ECJ, Case 405/92, *Etablissements Armand Mondiet SA* [1993] ECLI:EU:C:1993:906, para. 12.

⁸⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ [1992] L 206/7, 22.7.1992.

⁸⁵ Article 2(1).

⁸⁶ ECJ, Case C-6/04, *Commission v. United Kingdom* [2005] ECLI:EU:C:2005:626, para. 117.

In *Weber*, the Court affirmed adjudicative jurisdiction of a Member State over its continental shelf as, under international law, that country exercised sovereign rights in that area.⁸⁷ Similarly, in *Salemink* the Court held that EU law must be applied in the continental shelf of a Member State because that country exercised sovereignty over the area pursuant to Article 77 of the United Nations Convention on the Law of the Sea (UNCLOS).⁸⁸ The Court held that a state which takes advantage of its sovereign rights in the area cannot avoid the application of Union law.⁸⁹

3.4.c. *Transferability*

3.4.c.i. *Applicability of national law*

The decisions in *Boukhalfa*, *Prodest* and *Lopes da Veiga* point to the principle that EU law is applicable to extraterritorial situations which fall under the regulatory authority of a Member State, provided that the national provisions are determined by Union law.

The three cases concerned employment contracts having an extraterritorial element. As globalisation has made it increasingly common for employers to hire foreigners and send workers abroad, the CJEU has had many opportunities to develop case law on extraterritoriality in these situations. While Member State nationals are thus increasingly present outside of the EU, it is still rare for Member State officials to be present outside the territory of their respective countries. Unlike employment in the private sector, state-centric international relations make it conceptually more difficult for sovereign authority to be exercised in a foreign country.

However, if Union law is applicable when a situation falls under the regulatory authority of a Member State, it should make no difference whether the situation concerns private persons or state agents. In *Boukhalfa*, a Treaty provision was extraterritorially applicable to a contractual relationship between the state and an individual. This outcome must remain unaffected when the state does not act as a private person, but through an executive organ. The Member States' obligations incurred by the Treaties are clearly not limited to their private law relationships with citizens but apply to all state action. Therefore, if a state exercises enforcement jurisdiction abroad and if the laws of the state determining the procedures with which its agents must comply are prescribed by the EU, then Union law must consequently be applicable in these extraterritorial situations as well.

In the present case, the juxtaposed control zones fall under the regulatory authority of France under Article 9 of the Sangatte Protocol, which states:

⁸⁷ ECJ, Case C-37/00, *Weber* [2002] ECLI:EU:C:2002:122, paras. 35-36.

⁸⁸ United Nations Convention on the Law of the Sea, 1833 UNTS p. 396.

⁸⁹ ECJ, Case C-347/10, *Salemink* [2012] ECLI:EU:C:2012:17, paras. 33, 35, 36.

'The laws and regulations relating to frontier controls of the adjoining State shall be applicable in the control zone situated in the host State and shall be put into effect by the officers of the adjoining State in the same way as in their own territory'.

As French border guards are bound by French laws, which in turn are determined by EU law – either in the form of transposed national statutes or directly applicable Regulations – the applicable Union law also applies in the juxtaposed control zones.

3.4.c.ii. *Jurisdictional control*

It must be kept in mind that the referenced cases *Kramer*, *Mondiet*, *Commission v. UK*, *Weber* and *Salemink* concerned Member States' authority and control in the high seas, their exclusive economic zones and continental shelves. Nevertheless, the principle that jurisdictional control over maritime areas triggers the application of EU law can be transferred to land areas. If states must comply with EU law when they exercise sovereign powers, then the area in which these powers are exercised should be immaterial.⁹⁰ It would be implausible to bind a Member State in one extraterritorial area but not in another, if the Member State exercises at least the same degree of authority and control in both places.

The UK has consented to granting French officials the unobstructed exercise of authority in mutually agreed areas, insofar as their actions are covered by the bilateral treaties. French officers in the designated control zones are free to enforce their laws in foreign territory, as long as the laws concern border control. Their sovereign powers can therefore be compared with the functional jurisdiction that coastal states enjoy according to Articles 56 and 77 of the UNCLOS and which, according to the CJEU, suffices to apply EU law.⁹¹ France's right to extraterritorial border control and the right of coastal states to explore and exploit natural resources are both earmarked *ratione materiae* as well as *ratione loci*.

In the juxtaposed control zones, French officials have a broad range of sovereign powers. For example, they can detain or arrest people and conduct them to French territory.⁹² French officers in UK territory wear their national uniform⁹³ and are even permitted to carry firearms.⁹⁴ Their degree of jurisdictional control

⁹⁰ R. Mehta, 'The Continental Shelf: No longer a "terra incognita" to the EU', 49 *Common Market Law Review* (2012), 1395-1422 at 1417; see also, J. Waverijn and C.T. Nieuwenhout, 'Swimming in ECJ Case Law: The rocky journey to EU law applicability in the continental shelf and Exclusive Economic Zone', 56 *Common Market Law Review* (2019), 1623-1648 at 1645-1646 arguing that the applicability of EU law should extend not only to the exercise of sovereign rights under Articles 56 or 77 UNCLOS, but also to other maritime activities under States' jurisdiction and control.

⁹¹ J. Waverijn and C.T. Nieuwenhout, *supra* note 90, at 1632.

⁹² Sangatte Protocol, Article 10(1).

⁹³ *Ibid.*, Article 28(1).

⁹⁴ Article 2, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Making Amendments to the Additional Protocol to the Sangatte Protocol on the Establishment of Bureaux Responsible for Controls on Persons Travelling by Train between the United Kingdom and France, and to the Agreement Concerning the Carrying of Service Weapons by French Officers on the Territory

in the UK is therefore comparable with the control exercised by the Member States in their continental shelf and exclusive economic zone or at least to flag state authority in the high seas. The French State organs' exercise of sovereign authority thus triggers the application of EU law in those areas.

4. CONCLUSION

This article has shown that EU legislation can be interpreted as binding French officers who are extraterritorially present in UK territory carrying out juxtaposed border controls. The territorial predisposition of the texts of the examined legal instruments could be overcome by way of a teleological approach focusing on their respective object and purpose. Drawing from other EU practices on extra-territorial border control, this paper proposes that this form of frontier management is a well-regulated phenomenon in the Union, which further renders it difficult to exclude such checks from the scope of legal instruments relevant to border control. Finally, two triggers for the extraterritorial application of EU law were inferred from CJEU case law. This paper argues that these two principles are transferable to the situation of juxtaposed border controls between France and the UK.

Not only juxtaposed border controls but extraterritorial state operations overall are a rare feature of international law. Their exceptional nature stems from the territorially confined system of state life in general and, in the present case, the UK's withdrawal from the EU in particular. The scant occurrence of this form of bilateral cooperation might explain why, in many cases, the texts of EU legislation are rigidly territorial in their formulations. Yet it is surprising when their literal interpretation clashes with the explicitly declared purposes of the instruments, which are less effectively achieved when the scope of application is territorially restricted.

The possibility of extraterritorial state operations taking place outside EU territory should no longer be discarded because of their anomalous nature and sporadic use. Such practices may become increasingly common in the future due to new events and challenges that require increased cross-border cooperation. For example, in 2017, the French President suggested processing asylum claims in African territory.⁹⁵ Questions of extraterritoriality will certainly arise regarding the special status of Gibraltar after Brexit. The Schengen area will extend to the British exclave, thereby designating areas of a non-Member State as an external border. Spain, as the neighbouring Schengen state, will be responsible for implementing the Schengen rules in Gibraltar, although the

of the United Kingdom of Great Britain and Northern Ireland, 18 June 2007, UKTS 023/2007: Cm 7219; Article 4, Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the French Republic concerning the carrying of Service Weapons by French Officers on the territory of the United Kingdom of Great Britain and Northern Ireland, 4 February 2003, UKTS 028/2005: Cm 6604.

⁹⁵ N. Nielsen, 'Macron wants asylum claims to start in Africa', *EU Observer* (Brussels, 29 August 2017).

exact modalities are still to be negotiated.⁹⁶ The framework envisaged provides for shared border controls by Spanish and Gibraltarian authorities and has been compared with the juxtaposed border controls between France and the UK.⁹⁷

EU law already contains some formulations that demonstrate how extraterritorial operations can be accounted for. As in Article 52(1) TEU, highlighting the addressees of obligations is a useful way of including Member State officials abroad in the scope of the law. Secondary law shows several inconsistencies in this respect. While the text of most Regulations ends with the standard sentence 'This Regulation shall be binding in its entirety and directly applicable *in all Member States*',⁹⁸ Directives mostly contain the clause 'This Directive is addressed to the Member States'.⁹⁹ This may be explained by the corresponding wording of Article 288 TFEU, which anticipates the transposition of Directives by the Member States.

As this article has argued, the toolbox of the CJEU provides the means to bind extraterritorially present organs by Union law. Although the tools were devised by the Court to be used in specific cases, they can also be wielded usefully in comparable situations. Nevertheless, uniform legislative formulations would provide firmer legal grounding regarding the geographical scope of EU law.¹⁰⁰ As a Union founded on and committed to the value of the rule of law,¹⁰¹ the EU would be well-advised to make it unequivocal that the obligations it imposes upon its Member States do not end at their borders. As has been shown, a few simple adjustments to legislative texts could accomplish this.

⁹⁶ M. Martín and M. González, 'El texto del acuerdo entre España y el Reino Unido prevé demoler la verja de Gibraltar', *El País*, 11 January 2021, available at <<https://elpais.com/espana/2021-01-10/el-texto-del-acuerdo-entre-espana-y-reino-unido-preve-demoler-la-verja-de-gibraltar.html>>.

⁹⁷ Gibraltar's Chief Minister explained: 'This is a little like the juxtaposed controls that you would see at St Pancras station when you're going on the Eurostar. You'd go first through British passport control. And then a few steps later you'd go through the French passport control. That is exactly the set-up of what we propose should happen if the European Commission agree, and we elevate our pre-agreement into a treaty'. See G. Lee, 'Brexit: End to Gibraltar land border prompts joy and trepidation', *BBC*, 16 January 2021, available at <<https://www.bbc.com/news/world-europe-55674148>>.

⁹⁸ For example, Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, *OJ* 2008 L 250/1, 18.9.2008; Regulation (EC) No 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) No 613/91, *OJ* [2004] L 138/19, 30.4.2004 (italics added).

⁹⁹ For example, Article 9 of Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, *OJ* [2001] L 187/45, 10.7.2001; Article 18 of Directive 2003/99/EC of the European Parliament and of the Council of 17 November 2003 on the monitoring of zoonoses and zoonotic agents, amending Council Decision 90/424/EEC and repealing Council Directive 92/117/EEC, *OJ* [2003] L 325/31, 12.12.2003 (italics added).

¹⁰⁰ Also calling upon the legislature, J. Waverijn and C. T. Nieuwenhout, *supra* note 90, at 1639, 1647.

¹⁰¹ Article 2 TEU.

EUROPEAN UNION-EXTRATERRITORIALISATION IN THE WESTERN BALKANS: THE CASE OF THE FRONTEX-SERBIA STATUS AGREEMENT

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1. INTRODUCTION

The following article conducts a Political Science analysis of the European Border and Coast Guard (Frontex)'s new abilities to act in its immediate vicinity. In academic circles and among the public, there has been a growing debate regarding the EU finding ways to take greater responsibility for its own well-being and security. This debate goes further than classic defence issues; it applies to economic and general foreign policy issues and specifically revolves around concepts such as strategic autonomy, or particularly in France, European sovereignty. The increasing importance of Frontex in this debate is linked to the growing significance of Frontex's external work, which 'emanates from the external dimension of [the] EU's internal security policy'.¹ The creation of Schengen, increased terrorist concerns after 09/11,² the fear of adverse effects through EU enlargement rounds³ and anxieties sparked in the aftermath of the 2015 'migration crisis' have blurred the distinction between internal and external security in the EU. Cooperation with third countries has become a priority for the EU,⁴ affecting Frontex's mandate.

This article sheds light on the political and societal dynamics in third countries which enhance the level of cooperation with the ever-growing EU agency. Previously, Frontex concluded Working Arrangements (WA) with an array of third countries, formalising operational cooperation. However, the scope of the Status Agreements (SA) newly concluded with the Western Balkan countries has entailed a plethora of striking questions regarding Frontex's expanding activities. Specifically, this relates to how the Status Agreements allow for the extraterritorial exercise of executive powers and the use of force by Frontex team members in neighbouring third countries, thus displaying a new level of extraterritorialisation which not only delegates control to third parties but also allows for the actual territorial application of EU law and immigration control. Why would the

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¹ V. Meissner, *The European Border and Coast Guard Agency Frontex Beyond Borders: The Effect of the Agency's External Dimension*. <<https://ssrn.com/abstract=3085529>> (19 February 2021).

² J. Argomaniz, 'Post-9/11 institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia', *European Security* 18 (2009), 151-72.

³ J. Monar, 'The Area of Freedom, Security and Justice after the 2004 Enlargement', *The International Spectator* 38 (2003), 33-50.

⁴ S. Lavenex and N. Wichmann, 'The External Governance of EU Internal Security', *Journal of European Integration* 31 (2009), 83-102.

Western Balkan countries allow such a far-reaching encroachment on their sovereignty?

In order to answer this research question, this article proposes a relational perspective in the study of the evolution of extraterritorialisation by analysing the grounds for migration cooperation in third countries using a case study on Serbia's cooperation with Frontex.

2. RESEARCH DESIGN AND METHODOLOGY

2.1. Concept of externalisation and extraterritorialisation

The term *externalisation* denotes the use of 'extraterritorial state actions to prevent migrants, including asylum-seekers, from entering the legal jurisdictions or territories of destination countries or regions'.⁵ This prevents them from entering the territory where their legal protection claims can be acknowledged. Political scientists largely consider these actions to be interdiction measures and preventive policies that can be implemented on the common EU border or within the territory of third countries either by the EU itself or the third country in question.⁶ Indeed, depending on the consulted text, the terms externalisation and extraterritorialisation both describe the delegation of migration control to third parties, disregarding the distinction between the legal foundations that underlie them.⁷ Factually, the EU only rarely enacts extraterritorial legislation. Rather, the EU follows what Scott (2014) has labelled territorial extension, wherein it extends its regulatory power to third countries, albeit taking into account and following the legislation of such countries when doing so.⁸ Following Scott's (2014) distinction between territorial extension and extraterritoriality, we propose a distinction between externalisation and extraterritorialisation based upon the fact that the delegation of migration control to third parties revolves around the application of EU law outside and without a direct link to its own territory. As such, 'the off-shoring of states' own migration authorities',⁹ meaning the operation of Frontex and EU law in third countries, is encompassed in extraterritorialisation. The outsourcing of control responsibilities and duties to third countries is, however, part of externalisation.

As an illustration, consider the external measures enacted by the EU thus far in the area of migration control. These primarily include cooperation between

⁵ B. Frelick, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*. <<https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants>> (29 April 2021).

⁶ Ibid; S. Lavenex and F. Schimmelfennig, 'EU Rules Beyond EU Borders: Theorizing External Governance in European Politics', *Journal of European Public Policy* 16 (2009), 791-812.

⁷ L. Laube and A. Müller, 'Warum die Kontrolle abgeben? Die Delegation von Migrationskontrolle aus der Prinzipal-Agent-Perspektive', *Berliner Journal für Soziologie* 25 (2015), 255-81.

⁸ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', *The American Journal of Comparative Law* 62 (2014), 87-125.

⁹ T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge Studies in International and Comparative Law, 1. Aufl. (Cambridge: Cambridge Univ. Press, 2011).

law enforcement and border patrol. The application of EU law in these circumstances is directly linked to its own territory, as it concerns its common border with respective third countries, which points towards externalisation rather than extraterritorialisation. On the other hand, extraterritorial measures encompass policies that allow the EU to apply its law in the territory of the third country in question, irrespective of its jurisdiction. A prime example is the new measures on immunity and the use of force by Frontex team members under Status Agreements. While the third country must consent to these measures within the scope of the agreement, when doing so, the EU and specifically the Frontex team members are allowed to apply EU law without being held responsible under the civil or criminal law of the third country.¹⁰

2.2. Concept of sovereignty

Sovereignty is a central concept in various disciplines, including international law, sociology and political science/international relations. In political science, sovereignty is considered a central feature of statehood, originating from the 1648 Peace of Westphalia. The concept of the Westphalian state defines statehood as a system of political authority based on the principles of territoriality and autonomy. Despite some sceptical voices predicting the erosion of sovereignty as a result of the emergence of universal norms, such as human rights in the framework of the Responsibility to Protect (R2P), globalisation processes or, in Europe, European integration processes, sovereignty still continues to play a crucial role today. The nation state still exists and has important authority and control structures that are very sensitive to external interference.¹¹

Consider Jellinek's¹² prominent definition, his *Drei-Elementen-Lehre*. He argues that states are social entities which include state territory surrounded by borders, state authority and constituent people. In this sense, external entities are excluded from authority structures within the frontiers of a certain territory. Externalisation and extraterritorialisation, as described above, can be seen as measures that contradict the basic principles of sovereignty.

2.3. Case selection

To date, Frontex has concluded fourteen WAs with an array of countries since 2006. Since 2019, the EU has concluded three SAs with Western Balkan countries.

¹⁰ F. Coman-Kund, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...* <<https://verfassungsblog.de/the-territorial-expansion-of-frontex-operations-to-third-countries-on-the-recently-concluded-status-agreements-in-the-western-balkans-and-beyond/>> (19 February 2021).

¹¹ S. D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

¹² G. Jellinek, *Allgemeine Staatslehre*, Dritte Auflage (Berlin, Heidelberg, s.l.: Springer Berlin Heidelberg, 1921).

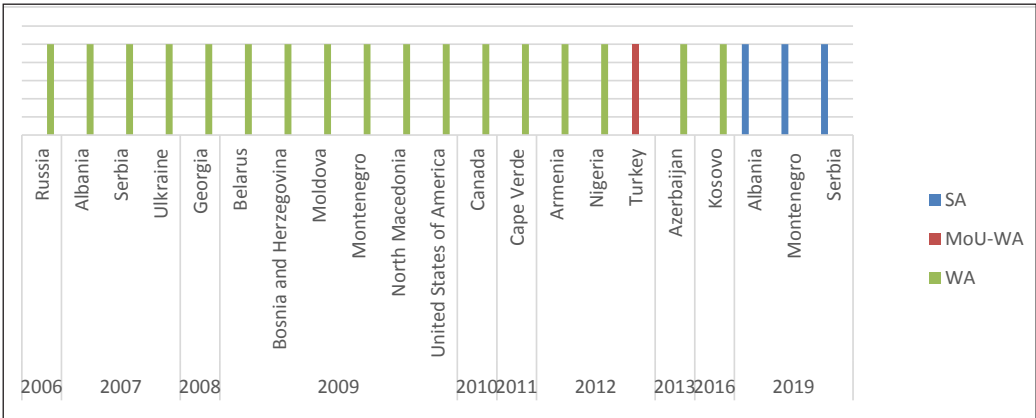


Figure 1. The evolution of WAs and SAs in the European Union’s neighbourhood over time. Source: Own data collection and illustration of Council data.¹³

The main legal difference between WAs and SAs is that only the latter are considered international agreements based on Article 218 of the Treaty on the Functioning of the European Union (hereafter, TFEU).¹⁴ As to their content, they are more specific and entail extraterritorial provisions.¹⁵ In particular, an initial look at the differences between the two kinds of instruments reveals that WAs merely provide information on the political will for joint return activities in third countries. By way of illustration, the 2007 WA between Frontex and Serbia stipulates: “Frontex and the Border Police of Serbia may explore possibilities to develop cooperation in the field of joint return operations [...]”.¹⁶

SAs clarify that joint return operations will be carried out by Frontex and how these are to be applied operationally based on previous readmission agreements between the EU and the third country in question. For example, Article 1(2) from the SA between the EU and Serbia states: “With regard to return operations as defined in point (d) of Article 2, this Agreement only concerns the provision of operational support for return operations which are carried out in accordance

¹³ Council of the European Union, *Infographic – Border management: agreements with non-EU countries*. <<https://www.consilium.europa.eu/en/infographics/border-management-agreements-third-countries/>> (15 July 2021). Frontex, *Working Arrangements with non-EU countries*. <<https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>> (15 July 2021)

¹⁴ Art. 218 Treaty on the Functioning of the European Union 2008 OJ [2008] C 115/144-145, 9.5.2008.

¹⁵ Coman-Kund, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*

¹⁶ Frontex, *Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Ministry of the Interior of Republic of Serbia* (2007). <https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Serbia.pdf> (15 July 2021).

with the EC-Serbia Readmission Agreement.”¹⁷ In this regard, SAs can be seen as implementing extraterritorial measures that are concluded within other legal treaties, but not as a continuation of or directly linked to WAs.

The most interesting and criticised aspect of the SAs entails the authorisation of the use of force in the territory of a third country as well as immunity from its criminal jurisdiction for Frontex team members.¹⁸ These provisions can also be found in the SA with Serbia. More specifically, Frontex team members are authorised to use force ‘while performing their tasks and exercising their powers [...] with the consent of the home Member State and the Republic of Serbia, in the presence of border guards or other police officers of the Republic of Serbia and in accordance with the national law of the Republic of Serbia’.¹⁹ However, Serbia may authorise Frontex team members to use force while not in the presence of border guards or other police officers. When considering that team members are also immune from the criminal jurisdiction of the Republic of Serbia, it can be argued that this points towards unprecedented extraterritorialisation.²⁰

To assess the underlying dynamics of extraterritorialisation in Serbia, we use process tracing, a method of analysing sequences of events to understand the occurrence of an outcome.²¹ In this paper, we specifically trace the process of preference formation and accordingly we consult various Serbian news outlets, choosing from media close to the ruling party, such as Blic and B92, and opposition newspapers, such as Danas. Furthermore, we draw upon secondary literature, English language news outlets, such as Balkan Insight, as well as reports from NGOs active in the field of migration policy in Serbia. This qualitative material is used to infer descriptive and causal evidence to answer our research question and verify our theoretical assumptions.²² The empirical part of our article initially develops evidence from secondary literature on migration cooperation with the EU, before turning to the preference formation process which led to the conclusion of the SA. This enables us to consider the structural and ideational setting in which preference formation takes place in Serbia.

To test the theoretical assumptions of the next chapter, Serbia was selected for case analysis from the three Western Balkan countries. Serbia is considered to be the least likely case to conclude an SA with Frontex. This is due to the fact that the loss of sovereignty involved in granting executive powers to an external

¹⁷ Council of the European Union, *Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia: 15579/1/18 REV 1* (21.2019).

¹⁸ Coman-Kund, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*

¹⁹ Council of the European Union, *Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia*.

²⁰ Coman-Kund, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*

²¹ D. Collier, ‘Understanding Process Tracing’, *PS: Political Science and Politics* 44 (2011), 823-30.

²² D. Beach, ‘It’s all about mechanisms – what process-tracing case studies should be tracing’, *New Political Economy* 21 (2016), 463-72.

actor on Serbian territory is likely to be a particularly sensitive issue for such a sovereignty-concerned state.²³ Historical events, such as the dissolution of Yugoslavia, its attempts to preserve the Yugoslav Federation and the continuing interstate conflict on the statehood of Kosovo, support this assumption.²⁴ Still today, Serbia can be considered a regional player capability-wise, e.g. militarily or economically, in the Western Balkans. Serbia has also received great attention from four international players – the EU, US, Russia and China – with the country having to balance varying interests ranging from trade, human rights issues, combating terrorism, energy politics and construction projects in the framework of China's Belt and Road Initiative. Therefore, there has been a dominant Serbian narrative on a constant struggle against the interference of great powers in the domestic affairs under Serbian authority and control.²⁵

3. FRONTEX'S CREATION, EXPANSION AND ACTIVITIES

Frontex was established by Council Regulation 2004 as the 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union'.²⁶ After several legal amendments, Frontex's founding regulation was ultimately replaced by Council Regulation 2016 creating a European Border and Coast Guard '[...] to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently [...]'.²⁷

The international dimension of EU policy expansion is not a new subject of investigation.²⁸ Numerous scholars have addressed the question as to if and how third countries contribute to achieving internal security in the EU, e.g. by assessing the consequences of outsourcing EU migration policy to North African states²⁹ or by analysing the European Neighbourhood Policy and its Justice and

²³ A. Čavoški, *Perceptions of the European Union in Serbia*. <https://eu.boell.org/sites/default/files/uploads/2013/12/perceptions_of_the_eu_in_serbia.pdf> (8 February 2021).

²⁴ S. Wohlfeld, 'Headed for Brussels without a Compass?: Serbia's Position between Rapprochement with the EU and Russian Influence', *DGAPkompakt* 18 (2015); C. A. Hartwell and K. Sidlo, *Serbia's Cooperation with China, the European Union, Russia and the United States of America* (2017).

²⁵ Hartwell and Sidlo, *Serbia's Cooperation with China, the European Union, Russia and the United States of America*.

²⁶ EC 2007/2004, *Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (2004).

²⁷ EU 2016/1624, *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard* (2016).

²⁸ S. Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control', *West European Politics* 29 (2006), 329-50; Lavenex and Schimmelfennig, 'EU rules beyond EU borders: theorizing external governance in European politics'; D. Wunderlich, 'The limits of external governance: implementing EU external migration policy', *Journal of European Public Policy* 19 (2012), 1414-33; D. Wunderlich, 'Towards Coherence of EU External Migration Policy? Implementing a Complex Policy', *International Migration* 51 (2013), 26-40.

²⁹ A. Geddes, 'Europeanisation Goes South: The External Dimension of EU Migration and Asylum Policy', *ZSE Zeitschrift für Staats- und Europawissenschaften / Journal for Comparative Government and European Policy* 3 (2005), 275-93.

Home Affairs dimension.³⁰ Later, this was followed by political and legal assessments of Frontex's newly-concluded WAs with third countries and international organisations.³¹ WAs create bilateral operational cooperation³² and 'cover exchange of information, exchange of analytical products and training tools, exchange of best practices, the participation of observers from one competent authority in various activities of the other authority, participation in various projects launched by FRONTEX'.³³ There are few WAs that additionally include financial aspects of cooperation.³⁴ As Lavenex (2006) has demonstrated, extraterritorialisation of migration control beyond the common territory commenced with bilateral cooperation with the EU's direct neighbourhood and would later reach shores well beyond Europe. Primarily, the EU's diplomatic leverage for externalising migration control beyond its borders remains a condition for membership,³⁵ strategically linking migration control to development and security issues.³⁶

Niemann and Speyer (2018) have brought this area of analysis into the study of Frontex's expansion, specifically the 2016 regulation on the European Border and Coast Guard (EBCG), which amended Frontex's mandate. They argue that dysfunctions stemming from the gap 'between Schengen (the abolition of internal borders), and the (consequent) need for stronger co-operation on external border management'³⁷ became evident during the 2015 European migration crisis, creating the opportunity for the EBCG regulation. Thereafter, during the 2016 and 2019 revision of Frontex's mandate, 'one of the most spectacular developments'³⁸ regarding Frontex came to light. Frontex's mandate was significantly strengthened by granting operational activities, including executive powers in *any* third country conditional on the conclusion of SAs.³⁹

³⁰ N. Wichmann, *The intersection between justice and home affairs and the European neighbourhood policy: Taking stock of the logic, objectives and practices*, CEPS working document (Brussels: CEPS, 2007), vol. 275.

³¹ F. Coman-Kund, 'The international dimension of EU agencies: Framing a growing legal-institutional phenomenon', *Foreign Affairs Review* 23 (2018), 97-118; M. Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'', *Utrecht Journal of International and European Law* 28 (2012), 20; R. H. i. Sagrera, 'Exporting EU integrated border management beyond EU borders: modernization and institutional transformation in exchange for more mobility?', *Cambridge Review of International Affairs* 27 (2014), 167-83; Meissner, *The European Border and Coast Guard Agency Frontex beyond borders*.

³² Core areas of cooperation include risk analysis, training, research and development, joint operations and, last but not least, operational interoperability (Coman-Kund 2018: 114).

³³ F. Coman-Kund, *European Union Agencies as Global Actors* (Routledge, 2018).

³⁴ *Ibid.*

³⁵ Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control'.

³⁶ Laube and Müller, 'Warum die Kontrolle abgeben? Die Delegation von Migrationskontrolle aus der Prinzipal-Agent-Perspektive'; L. Laube, 'The relational dimension of externalizing border control: selective visa policies in migration and border diplomacy', *Comparative Migration Studies* 7 (2019).

³⁷ A. Niemann and J. Speyer, 'A Neofunctionalist Perspective on the 'European Refugee Crisis': The Case of the European Border and Coast Guard', *JCMS: Journal of Common Market Studies* 56 (2018), 23-43.

³⁸ *Ibid.*, p. 1.

³⁹ *Ibid.*, p. 7; R. Parkes, *Healthy Boundaries: Remedies for Europe's Cross-Border Disorder*. <<https://www.iss.europa.eu/content/healthy-boundaries-remedies-europe-s-cross-border-disorder>> (19 February 2021); *Regulation (EU) 2016/1624 of the European Parliament and of the*

Frontex's rapid creation, its institutional evolution and the expansion of its mandate have formed the subject of extensive scholarly interest.⁴⁰ This article addresses Frontex's latest evolutions, which are clearly considerable and, for some scholars, even 'worrying'.⁴¹ Several scholars, such as Coman-Kund,⁴² have dealt with Frontex's expanding mandate and SAs from a critical legal perspective.⁴³ In-depth political and empirical-analytical analyses appear to be pending.⁴⁴

This article adopts a relational (in contrast to an interactionist) perspective. This means that, rather than looking specifically at the interactions between the EU and Serbia, we focus solely on Serbia's position in the interaction. The main focus concerns the underlying dynamics in a third country when concluding SAs with Frontex, as an instrument of this nature might arguably lead to a severe restriction of sovereignty.

4. THEORISING TERRITORIAL EXPANSION OF EU IMMIGRATION CONTROL

Collaborative research on International Relations (IR) theory and International Law began to flourish in the 1990s. Realism's former primacy within IR in explaining international politics decreased due to its inability to explain the end of the Cold War and the dissolution of the Soviet Union. Proponents of Classical Realism (Morgenthau) and Structural Realism (Waltz) consider the international system to be anarchic and unitary states, seeking power and survival, to be its key players. State behaviour is thus the result of changing structures,

Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC: (EU) 2016/1624 (2016); EU, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624: Regulation (EU) 2019/1896 (2019).

⁴⁰ S. Leonard, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', *Journal of Contemporary European Research* 5 (2009), 371-88.

⁴¹ Parkes, *Healthy Boundaries*.

⁴² (See, e.g., Coman-Kund 2018 or Bossong 2019).

⁴³ D. Fernandez-Rojo, 'Regulation 2019/1896 on the European Border and Coast Guard (Frontex): The Supranational Administration of the External Borders?' in M. Kotzur, D. Moya, Ü. S. Sözen and A. Romano (eds.), *The External Dimension of EU Migration and Asylum Policies* (Nomos Verlagsgesellschaft mbH & Co. KG, 2020), pp. 295-324; Carrera S., Curtin D. and Geddes A. (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (Fiesole: European University Institute, 2020); J. Pollak and P. Slominski, *The Role of EU Agencies in the Eurozone and Migration Crisis* (Cham: Springer International Publishing, 2021); L. Tsourdi, 'The New Pact and EU Agencies: an ambivalent approach towards administrative integration' in D. Thym (ed.), *The Special Series of Blogposts on the "New" Migration and Asylum Pact* (2021), pp. 133-52.

⁴⁴ R. Bossong, 'The Expansion of Frontex: Symbolic Measures and Long-Term Changes in EU Border Management', *SWP Comment* no. 47 (2019), 1-8; Coman-Kund, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*; Coman-Kund, *European Union Agencies as Global Actors*.

meaning changing power relations between states. From this perspective, realism was unable to explain many phenomena in IR, including its increasing legalisation, and opened the door for more suitable theoretical approaches to such issues.⁴⁵

In his liberal theoretical approach, Moravcsik argues initially that the distribution and representation of societal preferences determines a state's foreign policy choices.⁴⁶ Secondly, the (in-)compatibility of preferences between states determines foreign policy behaviour, such as potential restrictions on cooperation, and the strategic choice of behaviour. In 'The Origins of Human Rights Regimes: Democratic Delegation in Post-War Europe', he analysed European states' intentions to create such regimes in the first place and found that the drivers for institutionalising human rights norms were not old, liberally anchored democracies but young, liberally unstable democracies. The dominant preference leading to this foreign policy approach was rooted in the ambition to 'lock-in'/secure the democratic state in view of potential undemocratic threats in future.⁴⁷ In 'A Liberal Theory of International Law', Slaughter and Alvarez built on Moravcsik's theory and assessed the role of transnational networks in regulatory activities.⁴⁸ Based on his theoretical grounds, they argued that legal scholars should take an ontological view and learn to reposition international phenomena from state-to-state-relations to individual-governmental institutions-relations. They concluded 'that domestic institutions, including domestic courts, are (and should be) the principal means by which international rules are developed and applied'.⁴⁹

With a view to answering the research question, this paper turns to liberal theory as proposed by Moravcsik⁵⁰ in which social preferences play a key role. These have thus far not been analysed systematically in research literature on EU external migration control.⁵¹ In order to assess why and under which conditions third countries opt for far-reaching inroads into national sovereignty, we build on previous theoretical and empirical analyses on the extraterritorialisation of migration control. To date, analyses of EU external migration policy have relied on the assumption that destination countries strive to externalise borders to the EU's supranational level, to private companies as well as to countries of transit and origin, in order to compensate for lacking expertise, to shift unpopular policy decisions onto other entities and to increase the efficiency of admission

⁴⁵ B. A. Simmons, 'International Law' in B. A. Simmons (ed.), *Handbook of International Relations*, 2. ed. (London: Sage Publ, 2012), pp. 352-78.

⁴⁶ A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization* 51 (1997), 513-53.

⁴⁷ A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 54 (2000), 217-52.

⁴⁸ A.-M. Slaughter and J. E. Alvarez, 'A Liberal Theory of International Law', *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000), 240-53.

⁴⁹ M. Byers, 'International Law' in C. Reus-Smit and R. E. Goodin (eds.), *The Oxford Handbook of International Relations*, The Oxford Handbooks of Political Science (Oxford: Oxford Univ. Press, 2008), pp. 612-34.

⁵⁰ Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics'.

⁵¹ K. Natter, 'Rethinking Immigration Policy Theory Beyond "Western Liberal Democracies"', *Comparative Migration Studies* 6 (2018), 4.

decisions.⁵² Until now, most scholars have assumed that third country interests in cooperating with the EU on migration control are motivated by EU accession aspirations⁵³ as well as material gains in the form of financial and co-development assistance.⁵⁴

The conclusion of SAs between Frontex and the Western Balkan countries is an example of coordination in a sensitive policy field and implies some compatibility of societal and state preferences on both sides. What are these preferences in Serbia? The next section briefly outlines citizens' preferences and institutional constraints since the dissolution of Yugoslavia.

4.1. Multi-stage process of preference formation in Serbia

The dissolution of Yugoslavia and the transformation to democracy and market economy was a troubled path, accompanied by violent conflicts regarding sovereign statehood. Serbia held its first democratic elections in 1990, which were won by the successor party of the former Communist party, led by Slobodan Milosevic. Milosevic's political agenda was determined by attempts to preserve the Yugoslav state, but the individual republics wanted to leave or at least decentralise the union. He strove to build a semi-authoritarian regime with full control over the state apparatus, the centralised economy, the media, and political opposition and repression towards ethnic Albanians in Kosovo. Ultimately, Milosevic could not hold the remaining territory together and the Yugoslav republics became independent states. Only Montenegro remained in a federation with Serbia until 2006. In 2000, Slobodan Milosevic was removed from office after losing the war and due to the deteriorating socioeconomic situation. Democratic elections followed, which were won by the opposition, furthering the country's path towards democracy. Until 2008, the Serbian Government showed great dedication to liberal democracy and European integration. Serbia signed the Stabilisation and Association Agreement and was granted EU candidate status. Accession negotiations began.⁵⁵

2008 represented a turning point. The pro-EU Serbian Progressive Party (SNS) was created and won the 2012 and 2017 presidential elections as well as the 2014 parliamentary elections. Tomislav Nikolic and Aleksandar Vučić, former supporters of the Milosevic regime and the anti-EU Serbian Radical Party, were the SNS's founding members. The quality of Serbia's democracy

⁵² Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control'; Laube and Müller, 'Warum die Kontrolle abgeben? Die Delegation von Migrationskontrolle aus der Prinzipal-Agent-Perspektive'.

⁵³ Lavenex, 'Shifting up and out: The foreign policy of European immigration control'.

⁵⁴ J.-P. Cassarino, 'The "New Approach" to the Readmission of Illegal Persons: Operability versus Transparency', *This Century's Review* (2007); M. Panizzon, *Trade and Labor Migration: GATS Mode 4 and Migration Agreements*, Dialogue on Globalization Occasional Papers (Berlin: Friedrich-Ebert-Stiftung, 2010), vol. 47; A. Adepoju, F. van Noorloos and A. Zoomers, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review', *International Migration* 48 (2010), 42-75.

⁵⁵ BTI, *Country Report Serbia*. <https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SRB.pdf> (19 February 2021).

has since declined. Various studies and democracy indicators⁵⁶ have reported on election irregularities, limited assembly rights, limited freedom of expression and the separation of powers.⁵⁷ The Venice Commission has also taken a stance on the latter issue and criticised the constitutional change, the inefficiency of the courts and the high levels of corruption.⁵⁸

Serbia's democratic backlash came hand in hand with voters' changing preferences. Although SNS is formally a pro-EU party supporting the general idea of EU accession, their electorate is highly polarised on this issue. Such polarisation has increased since the Euro crisis, Brexit and the 2015 refugee crisis, with many believing that EU accession will not bring the much desired benefits. Opinion polls reveal that the true preconditions for EU membership are not legal harmonisation with the EU *acquis* but contentious issues, such as cooperation with The Hague on the extradition of war criminals or solving the Kosovo conflict. EU conditionality has increasingly been questioned among Serbian citizens.⁵⁹ Overall, contractual relations between the EU and Serbia have been greatly delayed by the Serbian backlash to the political conditionality linked to cooperation with and accession to the EU.⁶⁰ Although there seems to be no promising equivalent alternative to the EU for the majority of the political elite, there have been (mock) discussions on other options, such as a privileged EU partnership, membership of the European Economic Area or closer relationships with Russia and China.⁶¹ The leaning towards Russia has been frequently cited due to the historical and cultural ties of their societies.⁶² Scholars have noted that the main pillars of Serbia's foreign policy are balancing its identification with the East (Russia) against its rational and economic interests with the West (e.g. the EU).⁶³ This balancing act has inspired multiple scholarly works citing a lack of European identification among Serbia's citizens and political elites.⁶⁴ Serbia's 'neutral' response to the Ukraine crisis and resolve not to impose sanctions on

⁵⁶ See, for example, Freedom House; Bertelsmann Transformation Index; Politiiv IV, A. Castaldo, 'Back to Competitive Authoritarianism? Democratic Backsliding in Vučić's Serbia', *Europe-Asia Studies* 72 (2020), 1617-38.

⁵⁷ N. Zakošek, 'Democratization, State-Building and War: The Cases of Serbia and Croatia', *Democratization* 15 (2008), 588-610.

⁵⁸ Venice Commission, *CDL-AD(2018)011-e Serbia – Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary*. <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)011-e)> (01 June 2021).

⁵⁹ Čavoški, *Perceptions of the European Union in Serbia*; B. Stahl, 'Another "Strategic Accession"? The EU and Serbia (2000-2010)', *Nationalities Papers* 41 (2013), 447-68.

⁶⁰ Hartwell and Sidlo, *Serbia's Cooperation with China, the European Union, Russia and the United States of America*.

⁶¹ Ibid.

⁶² Čavoški, *Perceptions of the European Union in Serbia*; B. Zoric, 'Assessing Russian Impact on the Western Balkan Countries' EU Accession: Cases of Croatia and Serbia', *Journal of Liberty and International Affairs* 3 (2017), 9-18.

⁶³ A. Patalakh, 'Emotions and Identity as Foreign Policy Determinants: Serbian Approach to Relations with Russia', *Chinese Political Science Review* 3 (2018), 495-528.

⁶⁴ Wohlfeld, 'Headed for Brussels Without a Compass?'; Patalakh, 'Emotions and Identity as Foreign Policy Determinants: Serbian Approach to Relations with Russia'; Zoric, 'Assessing Russian Impact on the Western Balkan Countries' EU Accession'. These authors also emphasise the emotional and cultural ties with Russia, which continue to shape Serbia's accession negotiations (see: Wohlfeld, 'Headed for Brussels Without a Compass?'; Zoric, 'Assessing Russian Impact on

Russia demonstrates its reluctance to apply any normative change that would align its values and foreign policy with the EU.⁶⁵

4.2. The configuration and representation of societal preferences in Serbia

This paper argues that the conclusion of the Frontex-Serbia SA builds on the illustrated configuration and representation of societal preferences in Serbia:

- Serbian society has been characterised by great social polarisation on *unity* issues. There has been a growing preference gap as to whether to lean towards the EU or towards others. It seems that despite (mock) discussions on alternatives every now and then, the political elite/SNS still considers EU integration to be a viable development path.
- Serbian society has been characterised by great social polarisation on *sovereignty* issues. During the dissolution of Yugoslavia, (territorial) sovereignty was the main topic of conflict and has played a crucial role in the Kosovo conflict up to the present day. Furthermore, the EU's politics of conditionality and matters perceived as the 'true' preconditions for EU membership have increasingly been viewed as substantial sovereignty cuts.
- The Serbian political system has been characterised by a *representation bias* resulting from the democratic backlash of recent years. This paper argues that in an increasingly polarised society, a defective democracy such as Serbia represents, if anything, the preferences of a subset of society: Vučić/SNS voters. This subset appears to be very sensitive to unity and sovereignty issues.

This paper argues that Serbia's governing elite has been focusing on balancing the issues to which voters are sensitive: unity and sovereignty (societal preferences). If societal preferences conflict with those of the governing elite, obfuscation tactics are used to pursue the elite's preferred political agenda unhindered (general EU orientation).

5. UNDERLYING DYNAMICS OF EU EXTRATERRITORIALISATION IN SERBIA

Commentators are quick to note that the 2015-16 migrant crisis was a time when 'Serbia demonstrat[ed,...] European values in dealing with huge numbers of

the Western Balkan Countries' EU Accession'; Patalakh, 'Emotions and Identity as Foreign Policy Determinants: Serbian Approach to Relations with Russia'.

⁶⁵ Hartwell and Sidlo, *Serbia's Cooperation with China, the European Union, Russia and the United States of America*; Patalakh, 'Emotions and Identity as Foreign Policy Determinants: Serbian Approach to Relations with Russia'; Stahl, 'Another "Strategic Accession"? The EU and Serbia (2000-2010)'.

people trying to find safety in the EU via its territory',⁶⁶ while respecting the rules established by EU Member States in dealing with the issue. Consequently, the EU commented favourably on this cooperation in several Progress Reports, noting that Serbia continues to manage migration flows at its borders effectively.⁶⁷

The readmission agreement between the European Community and the Republic of Serbia establishes the obligation to readmit persons of Serbian nationality as well as third country nationals who have entered the EU through Serbia with specific conditions on modes of transport, processing of applications and responsibilities towards persons seeking residence or asylum.⁶⁸ This agreement can be seen as the first step taken by the two parties, which constitutes an instrument of EU external migration policy in the country. As noted by numerous authors, the EU introduced the prospect of accession and visa-free or facilitated travel in exchange for signing these agreements to several countries in the EU's eastern and southern periphery.⁶⁹ The aim was to secure the EU's external border, which had been changed due to eastern enlargement.⁷⁰ The conclusion of the WA with Serbia in 2009 came at the same time as visa-free travel within the Schengen area was granted to Serbian citizens. The conclusion of the 2009 readmission agreement was a prerequisite for visa-free travel and thus perceived as a measure of conditionality. However, the WA and the technical and operational cooperation on the EU's external border can be seen as further steps towards minimising the risk of irregular entry and stay of Serbian citizens within the EU.⁷¹

In the Serbian case, the country's geographic position was crucial during the 2015-16 migration crisis, with thousands of asylum seekers taking the Balkan route to the EU.⁷² As the EU grappled with how to manage the unprecedented influx of asylum seekers, the Serbian political elite claimed that the country was only being used as a transit point for northward migration, commenting that

⁶⁶ T. Mišćević, 'Contemporary Relations Between Serbia and the European Union' in J. Minic (ed.), *Challenges of Serbia's Foreign Policy: Collection of Papers* (Belgrade, 2015), pp. 15-20, at p. 20.

⁶⁷ European Commission, 'Key Findings of the 2019 Report on Serbia', *Press Release* (2019)..

⁶⁸ C. Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice', *European Journal of Migration and Law* 12 (2010), 45-79.

⁶⁹ S. Lavenex and E. M. Ucarer, 'The External Dimension of Europeanization: The Case of Immigration Policies', *Cooperation and Conflict* 39 (2004), 417-43; Cassarino, 'The "New Approach" to the Readmission of Illegal Persons'; Wunderlich, 'Towards Coherence of EU External Migration Policy? Implementing a Complex Policy'; Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy'.

⁷⁰ Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice'.

⁷¹ Migreurop, *Serbien und die EU dürfen die Reisefreiheit serbischer BürgerInnen im Schengenraum nicht einschränken*. <<http://www.migreurop.org/article1958.html?lang=fr>> (13 February 2021); Danas, *Saradnjom do bezbedne granice*. <<https://www.danas.rs/drustvo/saradnjom-dobezbedne-granice/>> (13 February 2021).

⁷² V. Lilyanova, 'Serbia's Role in Dealing with the Migration Crisis', *Briefing European Parliamentary Research Service* (2016).

Serbia was under no circumstances to become a 'parking lot for refugees'.⁷³ Vučić commented on the incoherent and inhumane treatment of migrants by several EU countries, highlighting that Serbia seemed to hold true to EU values of tolerance, cooperation and the principle of *non-refoulement* to a greater extent than these countries themselves.⁷⁴ Serbia focused its efforts on short-term measures for the reception, protection and resettlement of migrants.⁷⁵ This agenda was quickly abandoned, as the Balkan route closed and parliamentary elections were brought forward in April 2016, somewhat quietening the migration and asylum debate in Serbian political discourse.⁷⁶ Indeed, after the initial humanitarian response to the migration crisis and Vučić's shaming of EU countries on the matter, the President turned from claims of Serbia not becoming a 'parking lot for migrants' to the country withstanding pressure and conditionality from the EU, which was propelled by a decline in voter satisfaction with the former strategy.⁷⁷

In order to gauge the societal and political preference dynamics prevalent in the legitimisation of the SA, we consider instances of the Serbian ruling elite, opposition and media defending and explaining the agreement. The agreement was initialled in 2018, signed in 2019 and its ratification process completed in February 2021.⁷⁸ Overall, the justifications put forward for entering into the agreement were similar for all representatives of the administration. The issue of the initialling of the SA was particularly present in the media in September 2018. By 2019, the conclusion of the SA had already lost political traction, only flaring up again in 2020, with rising xenophobic rhetoric from the far-right opposition party Dveri.⁷⁹ As mentioned above, this led Aleksandar Vučić to change his rhetoric on the migration management issue: from claiming that Serbia was normatively superior to the EU to maintaining that the country would not buckle under EU pressures to house and accommodate rejected asylum seekers.⁸⁰

⁷³ A. Greider, *Outsourcing Migration Management: The Role of the Western Balkans in the European Refugee Crisis*. <<https://www.migrationpolicy.org/article/outourcing-migration-management-western-balkans-europes-refugee-crisis>> (11 February 2021); S. Šelo-Šabić, 'The Impact of the Refugee Crisis in the Balkans: A Drift Towards Security', *Journal of Regional Security* 12 (2017), 51-74.

⁷⁴ B92, *Vucic on Migrant Crisis: Egoism Reigns Among EU Countries*. <https://www.b92.net/eng/news/politics.php?yyyy=2016&mm=03&dd=30&nav_id=97526> (12 February 2021).

⁷⁵ Lilyanova, 'Serbia's Role in Dealing with the Migration Crisis'.

⁷⁶ Šelo-Šabić, 'The Impact of the Refugee Crisis in the Balkans: A Drift Towards Security'.

⁷⁷ BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*. <<https://balkaninsight.com/2020/03/09/balkan-states-beef-up-borders-against-migrant-security-threat/>> (17 February 2021).

⁷⁸ J. Unijat, *Common Western Balkan Migration Policy: Borders and Returns*, Regional Policy Paper II. <https://www.grupa484.org.rs/h-content/uploads/2020/04/FV-Borders_and_Returns_BRMC-grupa-484.pdf> (12 February 2021); Danas, *EU potvrdila sporazume o saradnji Srbije i Crne Gore i Fronteksa*. <<https://www.danas.rs/politika/eu-potvrdila-sporazume-o-saradnji-srbije-i-crne-gore-i-fronteksa/>> (13 February 2021).

⁷⁹ BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*; M. Stojanović, *Serbian Anti-Migrant Protest Condemned as 'Disgrace'*. <<https://balkaninsight.com/2020/03/09/serbian-anti-migrant-protest-condemned-as-disgrace/>> (13 February 2021).

⁸⁰ BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*.

Firstly, the Ministry of Interior and, specifically, its Head of the Department of International Cooperation, Zoran Lazarov, denied that the SA had been concluded, stating that if such an agreement were to be reached, it would first have to be signed and then ratified by the Serbian Parliament. He emphasised Serbian opposition to proposals for the establishment of reception centres and claimed that cooperation with Frontex would mainly entail cooperation in the area of border security, directly at the border.^{81,82} Moreover, the Prime Minister, Ana Brnabić, as well as Stefanović, stressed that the agreement, if signed, would lead to the fortification of Serbian borders and no 'occupation' through the creation of reception centres.⁸³ Indeed, reports had mentioned the creation of reception centres in the Western Balkans, similar to those opened in Libya, which would be financed by the EU. This led to the re-emergence of the aforementioned fear of Serbia becoming the EU's parking lot for migrants that had become immanent during the 2015-16 migration crisis and had been politicised during the 2020 parliamentary elections by the far-right.⁸⁴ Overall, as the issue of migrants being 'forced' to stay on Serbian territory was feared by many voters, the administration came under increasing pressure to justify its cooperation with the EU and specifically with Frontex.⁸⁵

Secondly, the Democratic Party of Serbia (*Demokratska stranka Srbije – DSS*) was very vocal in its opposition to the agreement, stressing that cooperation with Frontex would undermine Serbian sovereignty.⁸⁶ It openly addressed Ana Brnabić via the news media, questioning what the agreement would entail, if Serbia would have to readmit migrants from the Middle East, and what type of

⁸¹ Danas, *MUP demantuje da Fronteks dolazi u Srbiju*. 13 February 2021 (<https://www.danas.rs/drustvo/mup-demantuje-da-fronteks-dolazi-u-srbiju/>); M. Pejić, *EU STRAŽA STIŽE NA SRPSKE GRANICE: Sporazum potpisan, a Avramopulos poručuje za „Blic“ Srbija ovo NE SME DA RADU*. <<https://www.blic.rs/vesti/svet/eu-straza-stize-na-srpske-granice-sporazum-potpisan-a-avramopulos-porucuje-za-blic/mwhllx>> (13 February 2021).

⁸² The agreement was initialled several days later by the Serbian Minister of the Interior, Nebojša Stefanović, and the European Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos (Danas, *Srbija parafirala sporazum sa Fronteksom o upravljanju migracijama*. <<https://www.danas.rs/drustvo/srbija-parafirala-sporazum-sa-fronteksom-o-upravljanju-migracijama/>> (13 February 2021)) and signed in November 2019 by the same as well as by the Finnish Minister of the Interior, Maria Ohisalo, for the EU (B92, *EU i Srbija sklopile sporazum o graničnoj saradnji*. <https://www.b92.net/info/vesti/index.php?yyyy=2019&mm=11&dd=20&nav_category=1262&nav_id=1619945> (13 February 2021)).

⁸³ Blic, *Srbija neće biti sabirni centar za migrante, niko neće da nas okupira*. <<https://www.blic.rs/vesti/politika/stefanovic-srbija-nece-biti-sabirni-centar-za-migrante-niko-nece-da-nas-okupira/4090pt2>> (13 February); B92, *Reactions to "Migrant Centers in Serbia" and Frontex arrival*. <https://www.b92.net/eng/news/politics.php?yyyy=2018&mm=09&dd=18&nav_id=105094> (13 February 2021).

⁸⁴ Blic, *Srbija neće biti sabirni centar za migrante, niko neće da nas okupira*; Danas, *DW: Fronteks stiže u Srbiju?* <<https://www.danas.rs/drustvo/dw-fronteks-stize-u-srbiju/>> (13 February 2021); BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*.

⁸⁵ Blic, *Srbija neće biti sabirni centar za migrante, niko neće da nas okupira*; Danas, *MUP demantuje da Fronteks dolazi u Srbiju*; Pejić, *EU STRAŽA STIŽE NA SRPSKE GRANICE*.

⁸⁶ Danas, *DSS: Sporazum sa Fronteksom ugrožava suverenitet države*. <<https://www.danas.rs/politika/dss-potpisivanjem-sporazuma-sa-fronteksom-ugrozen-suverenitet-drzave/>> (13 February 2021).

immunity Frontex team members would enjoy on Serbian territory.⁸⁷ The Prime Minister did not respond directly but commented that any claims regarding the opening of reception centres for (Middle Eastern) migrants on Serbian territory were merely rumours, arguing that the cooperation with Frontex would only lead to the fortification of the borders and would only enhance Serbian security.⁸⁸ Rather than focusing on what the agreement actually entailed for EU-Serbia relations and cooperation, the administration continuously denied allegations of sovereignty loss, displaying a preoccupation with the issue and a need to justify the conclusion of the agreement in this respect. It appears that the (legally) controversial aspects of the agreement that could lead to expectations of sovereignty loss were ultimately silenced and border security became the main context in which the political elite justified the agreement.⁸⁹ As such, it can be expected that the focus on border security was used strategically to justify the agreement.

Thirdly, while members of the political elite did not voice this position in the analysed material, the EU and specifically Avramopoulos emphasised that the agreement was another stepping stone towards EU rapprochement for Serbia.⁹⁰ The opposition party, DSS, commented that, overall, the question remained as to which interests would be met with the SA: those of Serbia or those of certain Member States of the EU. Its view at the time was that, as sovereignty was in jeopardy, Serbia had little to gain from cooperation.⁹¹ A similar line of discourse was found in Vučić's comments on the EU imposing its (political) will on Serbia in 2020.⁹² Moreover, the increasing importance, budget and influence of Frontex within the EU made Serbian cooperation on migration management with the same indispensable for its future European path. Its management of the Balkan route and cooperation on border security ultimately put Serbia in a better bargaining position for EU accession and to maintain its balancing act with other ideational aims such as opposing Kosovar independence and maintaining good relations with Russia.⁹³

⁸⁷ Danas, *DSS uputio pitanja premijerki*. <<https://www.danas.rs/politika/dss-uputio-pitanja-premierkerki/>> (13 February 2021).

⁸⁸ Blic, *Srbija neće biti sabirni centar za migrante, niko neće da nas okupira*.

⁸⁹ S. Tatalović, *Slučaj Fronteks u Srbiji: granice rasta i razdora*. <<https://www.masina.rs/?p=7762>> (13 February 2021); Danas, *Cucić: Saradnjom sa Fronteksom Srbija ništa ne gubi*. <<https://www.danas.rs/drustvo/cucic-saradnjom-sa-fronteksom-srbija-nista-ne-gubi/>> (13 February 2021).

⁹⁰ B92, *EU i Srbija sklopile sporazum o graničnoj saradnji*; Danas, *Srbija parafirala sporazum sa Fronteksom o upravljanju migracijama*; Danas, *EU potvrdila sporazume o saradnji Srbije i Crne Gore i Fronteksa*.

⁹¹ Danas, *DSS: Sporazum sa Fronteksom ugrožava suverenitet države*.

⁹² BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*.

⁹³ M. Savković, *Frontex i region: novi akter na spoljnoj granici Evropske unije*. <<https://bfpe.org/u-fokusu/bfpi-liderski-program-fokus/frontex-i-region-novi-akter-na-spoljnoj-granici-evropske-unije/>> (17 February 2021).

6. CONCLUSION

Overall, the analysis reveals that the conclusion of the 2019 SA with Frontex can be explained by two underlying dynamics: Firstly, while EU identification may increasingly be lacking in society, Serbia still favours EU cooperation over other options (Russia, China). However, the SA, unlike the provisions under the *acquis*, is not an official prerequisite for EU accession. Therefore, by signing the same, the country does not have to change its foreign policy strategy, thus allowing it to maintain the balancing act described above. As the SA has less meaning for the official EU integration process, state preferences do not necessarily reflect voter preferences in this instance. The signing of the SA allows the country to improve its relations with the EU, while not endangering its standing with other foreign entities. As the first set of theoretical expectations suggests, Serbia's governing elite was able to pursue its preferences and had nothing to lose as the country was merely continuing old habits in the eyes of its voters: Serbia was already cooperating with Frontex, already involved in migration management and had already initiated cooperation with the EU which involved the extraterritorialisation of border control. It seems that the foreign policy sphere is kept insulated from the formation of societal preference in Serbia, indicating that obfuscation tactics are applied by the elite.

Secondly, societal preferences, such as the fear of sovereignty loss, were strategically invoked in justifying the agreement. Sovereignty loss, such as porous borders, became the main feature used to justify the SA. While the opposition focused on the negative aspects of this loss, maintaining that Serbia was conceding too much to EU interests and allowing "foreign occupation", members of Vučić's administration were able to silence particularly controversial aspects of the agreement through SNS control over the media and strategic repositioning of the issue. They switched the ongoing focus on sovereignty loss to highlighting the benefits brought to the country's border security by signing the SA. The strengthening of the border became the main aspect invoked in the analysed material. Interestingly, the issue of the opening of reception centres has been an ongoing concern for Serbian voters, invoked by opposition parties – both far-right and centre – and continuously denied by the administration. On the one hand, this reveals the reluctance of voters in Serbia becoming a country of destination, fearing the ethnic, cultural and religious 'infiltration' they perceive to be present in EU Member States. On the other hand, it demonstrates a sense of feeling used and conditioned by the EU to absorb the migrants it does not wish to take, becoming a buffer zone at the EU's external border. This has been especially politically expedient for the far-right, which has profited from the fear and anxiety created by state failings during the 2015-16 migration crisis both in Serbia and in the EU.⁹⁴ In such an environment, sovereignty loss becomes a particularly contentious issue, which must continuously be negated in order to, in this instance, justify the agreement. We thus maintain that our expectation can be upheld: Serbia's (visible) sovereignty losses brought about by

⁹⁴ BalkanInsight, *Balkan States Beef up Borders against Migrant 'Security Threat'*.

the crisis led to the country accepting another form of sovereignty loss, albeit one that would secure its borders against a threat it perceived to be more immanent, that of Middle Eastern migrants. The elite used various obfuscation tactics in order to achieve this.

Consequently, while the current state of affairs in literature may suggest that Serbia is not on the right path towards successful democratisation, particularly in view of the insulation of its foreign policy preference formation, there could not have been a better environment or partner for the EU's aim of externalising border control. Frontex's new abilities to act in its direct vicinity thus hinge on incomplete democratisation and xenophobia in the Western Balkans. Seeing as similar dynamics are afoot in the region, we assume that the insulation of foreign policy from public and media oversight, in addition to rising negative perceptions of (Middle Eastern) migrants, may explain the willingness of third countries to enter into such agreements.⁹⁵ It remains to be seen if the EU's external action in migration policy continues to be instrumentalised by third country ruling elites or if it is able to contribute to improving border security and humanitarian assistance to refugee populations in the region. Indeed, it would serve the EU well to consider the implications that its external action has on society in these countries, particularly with regard to potential backlashes against refugee populations, as demonstrated by the recent xenophobic protests against the 'foreign infiltration' and 'occupation' by Middle Eastern migrants as well as the forming of 'national patrols' by far-right organisations, which intercept and intimidate migrants in the country.⁹⁶

⁹⁵ Ibid.

⁹⁶ Stojanović, *Serbian Anti-Migrant Protest Condemned as 'Disgrace'*.

BEYOND 'THE TERRITORY TO WHICH THE TREATY APPLIES' – THE APPLICATION OF UNION RULES OF THE AIR TO FOREIGN CONDUCT AND ITS CONSEQUENCES FOR GLOBAL AVIATION

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1. INTRODUCTION

Europe has one of the most developed air transport markets in the world, with a 25.9 per cent share of global passenger traffic, generating annual direct benefits comparable to the GDP of Czechia.¹ Global in nature, the sector is not confined to the boundaries of any region. The EU market attracts a multitude of foreign competitors, whereas 'Community air carriers'² expanded the network of connections providing (pre-pandemic) services for almost half of international passengers worldwide.³ The daily success of all these operations is an enormous undertaking entailing great technical thought, but also – from the standpoint of law and regulatory governance – covering a wide range of issues from maintenance to environmental protection. At the same time, the international aviation community operates on the basis of traditional Westphalian State sovereignty.⁴ The main forum of this regulatory regime (the so-called 'Chicago System') remains the International Civil Aviation Organization (ICAO) with membership reserved to countries.⁵

Despite being a latecomer to a system dominated by nation states, over recent decades, the European Union has managed to create a single air transport market with substantial legislation.⁶ It has also introduced an external dimension to the policy in question, albeit to a limited extent. When considering the EU presence in global aviation, a great deal of attention has been drawn to key agreements or individual contentious issues, such as the inclusion of avia-

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¹ Due to regional links, the data refer to the entire region. Data for the EU-27: 19.6 per cent share of global passenger traffic, USD 199 billion of direct contribution to GDP. Comparison after Air Transport Action Group, 'Aviation: Benefits Beyond Borders' (September 2020), 50-51.

² The concept of *Community air carriers* means all carriers holding a valid operating licence granted in accordance with Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, OJ [2008] L 293, 31.10.2008. Thus, majority-owned, and effectively controlled by EU shareholders. It was introduced with the liberalisation in place of the national carriers of EU Member States.

³ Industry High Level Group, 'Aviation Benefits Report' (2019), p. 58, available at <<https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf>>.

⁴ S. Truxal, *Economic and Environmental Regulation of International Aviation* (Abingdon: Routledge 2017), p. 36

⁵ Art. 92 of Convention on International Civil Aviation 1944, 15 UNTS.

⁶ M. Dąbrowski, 'Transport Policy: EU as a Taker, Shaper or Shaker of the Global Civil Aviation Regime?', in G. Falkner and P. Müller (eds.) *EU Policies in a Global Perspective: Shaping or Taking International Regimes?* (New York: Routledge 2014), 130, 131.

tion in the Emissions Trading Scheme (ETS) or Passenger Name Record (PNR) protection.⁷ Against this background, the paper takes a closer look at the extra-territorial effects embedded in the EU legislation on civil aviation. Legal acts regulating various aspects of commercial aviation frequently refer to 'the territory to which the Treaty applies' or similar phrases.⁸ Nevertheless, they contain provisions that, in many situations, extend beyond EU borders, thus revealing a complex relationship between the issue of territoriality and the reach of EU law.

Taking this as a starting point, the paper reflects on the application of Union rules of the air to foreign conduct and on the broader consequences of this application. Secondly, the paper argues that applying EU law outside the territory subject to the provisions of the Treaty, provided for by EU regulations, constitutes a significant supplement to the formal activity of EU institutions on the international stage and, as such, an innovative method of external engagement. This may affect both the shape of the regulatory framework for civil aviation in other parts of the world and lead to a gradual evolution of the European Union's role in the global aviation system. In this regard, the article continues Kassim and Stevens' discussion of the relationship between EU action and the international system governing air transport.⁹ It also contributes to a broader discussion on the global reach of EU law, regulatory governance, and EU unilateral action. Based on previous literature and looking at instruments adopted in various subject areas, it seeks to organise the picture of EU activities in the entire domain of aviation and provide further insight into the mechanism of external influence incorporated into EU regulations, along with its political implications.

⁷ See *inter alia* J. Balfour, 'EC External Aviation Relations: The Community's Increasing Role, and the New EC/US Agreement', 45 *Common Market Law Review* 2008, 443-463; J. Scott and L. Rajamani, 'Contingent Unilateralism – International Aviation in the European Emissions Trading Scheme', in B. Van Vooren, et al. (eds.) *The EU's Role in Global Governance: The Legal Dimension* (Oxford: Oxford University Press 2013), 209; M. Kars, H. Stout, 'The Transatlantic Common Aviation Area: Competing Legal Orders and State Self-Interest', in A. Follesdal, et al. (eds.) *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (Leiden: Brill 2008); C. Woll, 'The Road to External Representation: the European Commission's Activism in International Air Transport', 13 *Journal of European Public Policy* 2006, 52-69; C. Woll, 'Open Skies, Closed Markets: Future Games in the Negotiation of International Air Transport', 19 *Review of International Political Economy* 2012, 918-941; V. L. Birchfield, 'Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions', 22 *Journal of European Public Policy* 2015, 1276-1294; P. Christidis, 'Four Shades of Open Skies: European Union and Four Main External Partners', 50 *Journal of Transport Geography* 2016, 105-114; A. Lidenthal, 'Aviation and Climate Protection: EU Leadership within the International Civil Aviation Organization', 23 *Environmental Politics* 2014, 1064-1081; E. Carpanelli, N. Lazzarini, 'PNR: Passenger Name Record, Problems Not Resolved? The EU PNR Conundrum After Opinion 1/15 of the CJEU', 42 *Air & Space Law* 2017, 377-402.

⁸ The author uses a general phrase here. It refers to the Treaty on the Functioning of the European Union (previously provisions of the Treaty Establishing the European Community). Other wording in regulations examined here includes 'the territory subject to the provisions of the Treaty' and 'the territory of the Member States to which the Treaty applies'. However, it should be noted that the actual geographical scope of specific regulations may differ and covers only territories of EU Member States or also includes EFTA and additional territories (Gibraltar, Åland Islands, etc.).

⁹ H. Kassim and H. Stevens, *Air Transport and the European Union: Europeanization and its Limits* (Basingstoke: Palgrave Macmillan 2010), p. 270.

The article is structured as follows: section 2 charts the relationship between the provisions contained in EU regulations and existing international arrangements. The article then explores the provisions applicable to situations with foreign elements by focusing on six EU aviation regulations. The cases cover a variety of issues in order to highlight the scope of EU aviation policy and to identify any potential differences between the instruments (Section 3.1). The article then considers the reach of EU law beyond EU borders (section 3.2), along with the foundations and legitimate concerns underlying the measures in question (section 3.3) and an analysis of safety valves and penalty defaults (section 3.4). The article closes, in section 4, with a discussion of the implications for EU aviation policy and the EU's position in the international system governing air transport. In conclusion, it argues that the recurring application of Union rules of the air to foreign conduct makes it possible not only to strengthen regulations and standards or to push for action, but can also be an effective element of influence on governance and place assigned to the European Union in the international aviation system.

2. RELATIONSHIP WITH THE GLOBAL AVIATION SYSTEM

The main international forum in the field of air transport is the ICAO, a UN specialized agency based on the Chicago Convention (1944) to which only sovereign states can accede. The Organization prepares Standards and Recommended Practices (SARPs) laid down as annexes to the Convention. The SARPs cover technical and operational aspects of international civil aviation, including safety, air traffic services, facilitation, and security (followed by supplementary materials and detailed instructions). In addition, the ICAO is responsible for training, capacity-building programmes, and regular audits of states' oversight systems with regard to their adherence to the agreed principles. However, the intergovernmental agency is not a global regulator and has no authority to enforce the SARPs. The member states are responsible for transposing the annexes into their domestic laws and they retain the right to notify the ICAO of any divergences from those standards, a mechanism that can lead to further discrepancies in local practices.¹⁰

Against this background, the EU is a latecomer. Although formally not a contracting party of the ICAO, it currently carries out many tasks on behalf of and within the mandate set by the EU Member States. It also collaborates with the ICAO operationally. With regard to unilateral regulations, the EU's actions are consistent with the core objectives of the global aviation system. In terms of passenger rights, EU legislation adds obligations in areas not covered by multilateral conventions but subject to a patchwork of national regimes and voluntary industry commitments, with which the ICAO did not go so far as to recommend convergence.¹¹ Where SARPs have been introduced, EU law

¹⁰ Art. 37 and 38 of the Convention on International Civil Aviation, *supra* note 5.

¹¹ ICAO, 'Consumer Protection', available at <https://www.icao.int/sustainability/pages/eap_ep_consumerinterests.aspx>.

refers directly to them as a baseline. Airlines and other service providers are vetted in terms of their compliance with the SARPs; a decline in monitoring quality within the country of origin below the relevant global standards is also a ground for withdrawal of the Third Country Operator (TCO) safety authorisation.¹² Therefore, EU law gives legislative force to international rules, as well as establishing sanctions for non-compliance.

However, the Union does not stop there. It not only enforces ICAO standards but is also actively involved in improving and developing them both in the common market and beyond its borders. Interestingly, in this respect, there was an attempt to include aviation emissions generated over the high seas or third countries in the scope of the EU ETS.¹³ This action was undertaken in light of the lack of progress in the ICAO's work on the global regulatory scheme and was aimed at partially bridging this gap.¹⁴ Although important, this is not an isolated case. Generally, where the global system allows considerable flexibility or permits variations to specific procedures, the EU instead works towards specification and enhancing harmonisation. This becomes even more important when considering the EU's general precautionary approach, especially in the context of flight safety where this is reinforced by high-profile incidents and the fear of a decline in passenger confidence. Consequently, the EU has considered some international rules to be too lax and decided within its remit to pursue more stringent ones. For instance, in order to obtain a TCO Authorisation to carry out operations on the common market, the aforementioned international standards must be met but also the additional requirements imposed unilaterally by the EU must be respected.¹⁵ Moreover, the EU claims the right to assess the validity of differences reported to the ICAO by sovereign states (in accordance with their prerogatives under the Chicago Convention).¹⁶ Such differences in the domestic law of third countries can still be accepted if the European Aviation Safety Agency (EASA) considers that an equivalent level of safety is in place.¹⁷ The EU legislative framework also provides for enhancing

¹² TCO.200 (a) in Section II of Annex 1 and ART.235, Section II of Annex 2 to Commission Regulation 452/2014 of 29 April 2014 laying down technical requirements and administrative procedures related to air operations of third country operators pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, *OJ* [2014] L 133/12, 6.5.2014 (hereafter, Commission Regulation 452/2014). Art. 83 of Regulation 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, *OJ* [2018] L 212/1, 22.8.2018 (hereafter, Regulation 2018/1139).

¹³ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *OJ* [2009] L8, 13.1.2009 (hereafter, Directive 2008/101/EC).

¹⁴ R. Smithies, 'Regulatory Convergence – Extending the Reach of EU Aviation Law', 72 *Journal of Air Law and Commerce* 2007, at 18.

¹⁵ TCO.200 (a) in Section II of Annex 1 to Commission Regulation 452/2014, *supra* note 12.

¹⁶ *Ibid.*, Art. 38 of Convention on International Civil Aviation, *supra* note 5.

¹⁷ TCO.200 (a) in Section II of Annex 1 to Commission Regulation 452/2014, *supra* note 12.

control over actual performance, both at the level of state authorities and individual entities.

3. SITUATIONS WITH FOREIGN ELEMENTS IN EU AVIATION LEGISLATION

3.1. The scope of the main EU Aviation Regulations

According to Regulation 2111/2005, foreign airlines can be placed on the EU Air Safety List (ASL). This is a list of airlines subject to an operating ban within EU airspace. The ban is imposed by the European Commission for safety reasons and may involve a partial restriction on access or the full withdrawal of rights to operate in EU airspace (including overflights).¹⁸ The first list was published in 2006 and it has been updated periodically since then. The rationale behind Regulation 2111/2005 was to develop a common measure based on existing national instruments. It is worth adding that national authorities reserved the right to impose local bans in case of urgency or safety problems affecting them specifically.¹⁹

The second instrument in the area of safety regulation is the Third Country Operators (TCOs) Authorisation pursuant to Regulation 452/2014. This is one of the requirements that must be met by foreign airlines in order to carry out commercial air transport into, within, or out of 'the territory subject to the provisions of the Treaty'.²⁰ Authorisation is not required for overflying without landing. The scheme concerns compliance with operational and safety standards. It should therefore be distinguished from operating permits, which relate to commercial traffic rights and are still issued by the national authorities. The competence to grant approval for and to monitor the TCOs lies with the EASA. The authorisation is granted at the request of the airline, accompanied by a specification of privileges and the scope of activities that may be undertaken by an operator in EU airspace.²¹ The concept itself is not new. Previously, monitoring of the safety performance was exercised through various schemes of the individual Member States. Corresponding measures can be found in other parts of

¹⁸ Blacklisting is also a reason for the revocation of TCO authorisation by the EASA. However, air carriers subject to a ban or operating restriction can still apply to the Agency for an assessment. See ART.235, section II of Annex II, *ibid*.

¹⁹ In fact, the initial proposal only required the publication of a consolidated list of national restrictions and the obligation to exchange information. It was only during the decision-making process that the EU decided to create a joint mechanism. See Proposal for a Regulation of the European Parliament and of the Council on the information of air transport passengers on the identity of the operating carrier and on communication of safety information by Member States, COM/2005/0048 final, European Commission, (Brussels, 16.2.2005), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2005%3A0048%3AFIN>>.

²⁰ In this case, the measures cover 27 EU Member States but also EFTA and additional territories in which European aviation rules apply (Gibraltar, Åland Islands, etc.). Authorisation is not required for overflying without landing. Unauthorised, short-term access is only available in exceptional circumstances. See EASA, 'Third Country Operators (TCO)', available at <<https://www.easa.europa.eu/domains/air-operations/tco-third-country-operators>>.

²¹ Commission Regulation 452/2014, *supra* note 12.

the world.²² Regulation 452/2014 provided uniform rules for the EU market and reduced the administrative burden for airlines as well as national authorities. At the same time, relying on traditional standards developed by the ICAO as the minimum level, EU decision-makers refined and further specified the procedures to ensure that TCOs are subject to safety requirements comparable to those applicable to Community air carriers.²³

Another essential element of the aviation system is air traffic management (ATM) and air navigation services (ANS). Following ICAO standards, the certification of personnel/organisations in this safety-critical industry is the responsibility of the national authorities.²⁴ However, EU legislation provides an additional set of rules for a single European system (including common requirements) and divides oversight powers between the Member States and the EASA. Under Regulation 1108/2009, foreign ATM/ANS organisations providing services in the airspace of a territory to which the Treaty applies, traffic controller training organisations located in third countries (together with personnel, where relevant), and providers of pan-European ATM/ANS services are subject to EASA certification.²⁵ In the case of local providers, the EU decision-makers have kept national oversight in place.²⁶

In the area of aviation security, Commission Implementing Regulation 1082/2012 introduced rules protecting inbound cargo and mail based on Aviation Security Validation and ACC3 certification.²⁷ ACC3 stands for 'Air Cargo or Mail Carrier operating into the Union from a Third Country Airport'.²⁸ The designation process mainly assesses the quality of the carrier's security programme and its execution. Only air carriers granted ACC3 status can transport products into or through the European Union. Consignments entering EU airspace must be checked in accordance with EU obligations. They must, therefore, be physically screened or originate from a secure supply chain and must have been adequately protected from unauthorised interference from the initial control until unloading.²⁹

²² In the USA, for example, it is the safety authorisation granted by the FAA (so-called Part 129).

²³ European Commission, 'Aviation: certifying third country operators to cut red tape and boost air safety', *Press release* (2 July 2015), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5298>).

²⁴ M. Arblaster, *Air Traffic Management: Economics Regulation and Governance* (Amsterdam: Elsevier 2018), p. 81.

²⁵ Art. 80-81 of Regulation 2018/1139, *supra* note 12.

²⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Extending the tasks of the European Aviation Safety Agency – an agenda for 2010, COM/2005/0578 final, Commission of the European Communities (Brussels, 15.11.2005), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0578&from=EN>>.

²⁷ Commission Implementing Regulation 1082/2012 of 9 November 2012 amending Regulation (EU) No 185/2010 in respect of EU aviation security validation, *OJ* [2012] L 324/25, 22.11.2012.

²⁸ *Ibid.*

²⁹ Para. 27 of Annex to Commission Implementing Regulation 2017/815 of 12 May 2017 amending Implementing Regulation (EU) 2015/1998 as regards clarification, harmonisation and simplification of certain specific aviation security measures, *OJ* [2017] L 122/1, 13.5.2017.

With regard to passenger rights, two particularly significant instruments are worthy of attention.³⁰ Regulation 261/2004 establishes common rules on compensation and assistance to passengers in case of denied boarding, cancellation, or long delay causing serious trouble and inconvenience.³¹ This regulation contains basic European standards of consumer protection, along with information obligations, compensation sums, and details on the length of the delays after which airlines are required to provide additional assistance. The obligations apply to airlines and tour operators as well as air carriers performing the service on behalf of the contracting party.³² The second instrument consists of the obligation to inform passengers of the identity of an operating carrier in accordance with the relevant provisions of Regulation 2111/2005.³³ It extended the right of passengers to reimbursement or re-routing to include cases where the operating air carrier is blacklisted in the EU and a flight is consequently cancelled or would have been cancelled if it had been operated in European airspace.³⁴

The analysis also covered the case of Directive 101/2008 which aimed to include aviation activities in the EU ETS, a cap-and-trade system designed to reduce absolute greenhouse gas emissions through allowance trading. Initially, the scheme was to apply from 2012 to all commercial flights departing from or landing in the EU.³⁵ Based on this wording, emissions generated throughout the entire route, including the parts outside of EU airspace, would have been calculated and charged accordingly. The administration of the scheme was vested in the EU Member States.³⁶

³⁰ Other measures include insurance requirements, assistance for people with disabilities, etc.

³¹ Regulation 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ [2004] L 46/1, 17.2.2004 (hereafter: Regulation 261/2004).

³² Art. 3, *ibid.*

³³ Art. 10 of Regulation 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC, OJ [2005] L 344/15, 27.12.2005 (hereafter, Regulation 2111/2005).

³⁴ Art. 12, *ibid.*

³⁵ Art. 1, point (b), Annex I to Directive 2008/101/EC, *supra* note 13. Currently, all external flights are excluded under temporary derogation: Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, OJ [2017] L350, 29.12.2017. See, also, European Commission, 'Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council', *Memo* (12 November 2012), available at <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_854>.

³⁶ Art. 1, para. 15, Directive 2008/101/EC, *supra* note 13.

3.2. Extraterritoriality and territorial extension of EU Aviation Legislation

The research findings suggest that the EU has engaged in the process of building an extensive legislative framework in various areas of air transport. In many instances, the established requirements go beyond EU airspace and scrutinise standards, systems, and procedures in third countries. It should be noted that some of these regulations are based on tools already available in the state-centric system and do not give rise to any objections. Some, by their very nature or definition, had to refer to conduct occurring abroad. The EU legislation replaced the schemes of the individual Member States with respect to conditioning the provision of services by TCOs or air navigation services. In addition, the Air Safety List was constructed on the basis of previous national instruments.

Furthermore, the legislative framework referred each time to the relationship between the subject of the regulation and the EU territory. The main triggers can be found in relation to the transient presence (the case of emission trading, Aviation Security Validation, TCOs Authorisation), the provision of services on the EU market (ATM/ANS certification), or its participants (approvals for traffic controller training organisations located in third countries). In the case of passenger rights, EU rules apply to a flight operated by a non-Community carrier if it departs from an airport located in the Union's territory.³⁷ Importantly, this covers the entire transport service to the final destination.

As ruled by the CJEU in the *Claudia Wegener v. Royal Air Maroc SA* case, it also applies to a segment operated by a non-Community carrier entirely outside the EU, even after a change of aircraft, as long as it is part of the passenger transport included under a single booking that started from an EU airport.³⁸ Regulation 261/2004 does not apply to inbound flights operated by foreign airlines. The decision-makers concluded that such a provision 'would be invalid on the grounds of extraterritoriality'.³⁹ In accordance with Scott and the distinction in terms of the types of global reach of EU law, the aforementioned cases must be classified as 'territorial extension' rather than as a form of genuine extraterritoriality.⁴⁰

However, when it comes to ASL, the list may also include airlines that have never offered services to the European Union. This relates to the second aim of the regulation which is to provide EU passengers with access to information

³⁷ Art. 3(1) of Regulation 261/2004, *supra* note 31.

³⁸ ECJ, Case-537/17, *Claudia Wegener v. Royal Air Maroc SA*, EU:C:2018:361; paras. 18 et seq.; see, also, C. Thijssen and D. Deschuttere, 'CJEU Extraterritorial Airways: A Critical Analysis of the Judgment of the Court of Justice of the European Union in the *Wegener* Case', 43 *Air and Space Law* 2018, 609-618.

³⁹ Steer Davies Gleave, 'Exploratory Study on the Application and Possible Revision of Regulation 261/2004', *Final Report* (2012), 258-259. US law contains these requirements for foreign operators. J. A. Silversmith, 'The Long Arm of the DOT: The Regulation of Foreign Air Carriers Beyond US Borders', 38 *Air and Space Law* 2013, 201-210.

⁴⁰ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2014; M. Cremona, J. Scott, 'Introduction' in M. Cremona, J. Scott (eds.) *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 1.

on the safety of operators worldwide, even where the ban does not apply directly.⁴¹ Moreover, Regulation 2111/2005 extended the right of passengers to reimbursement or re-routing to include cases where the operating air carrier is blacklisted. As a consequence, if a service starts from an EU airport, passengers have the right to withdraw individually from the flight operated by the banned airline that takes place entirely outside of EU territory and to claim compensation on the basis of the ASL regulation. For instance, if a person is travelling from Paris to Cape Town with a stop in Harare, and during that journey, they learn that the operator providing the service between Harare and Cape Town was included in the EU ASL, they may continue the journey or withdraw from the second flight and seek reimbursement.

At several points, the content of EU legislation goes beyond the traditional models adopted by states. In addition to stringent requirements, the EU regulations demonstrate a greater emphasis on the aspect of their actual enforcement and its continuous monitoring. The Union requires data on and access to foreign premises under technical inspection/audit mechanisms.⁴² Any failure to comply is subject to penalties, including, as a last resort, the loss of access to the EU market. With regard to safety measures, a typical scheme in line with the Chicago system is an audit of a third country's regulatory oversight system in terms of its compliance with ICAO standards. The Commission's approach, on the other hand, when preparing the Air Safety List, includes an analysis of both air carriers and foreign authorities responsible for monitoring them.⁴³ As a result, the ban can be imposed on an individual entity or on all air carriers certified in a given country. Moreover, the European Commission takes account not only of formal adherence to ICAO norms but of a broader set of factors, such as the airline's ability and/or willingness to address safety deficiencies or the regulator's records of cooperation with other countries.⁴⁴

Even in the case of TCO authorisation, the EU carries out a two-level assessment. Firstly, there is a careful analysis of an individual carrier, based on acquired documentation and safety performance data. Hence, this involves a firm-level territorial extension.⁴⁵ However, the term 'sufficient level of confidence' which appears in Regulation 452/2014 also refers to the oversight capabilities of the third country responsible for the operator's certification. Here, the evaluation covers the outcome of ICAO audits and national safety assessment pro-

⁴¹ European Commission, 'Questions and answers on the list of air carriers subject to an operating ban in the EU (the "black list")', *Memo* (8 April 2009), available at <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_162>.

⁴² See *inter alia* ART. 200 and ART. 205, Section II of Annex 2 to Commission Regulation 452/2014, *supra* note 12; Art. 83 of Regulation 2018/1139, *supra* note 12.

⁴³ P. S. Dempsey, 'Blacklisting: Banning the Unfit from the Heavens', *SSNR* (18 November 2015), 23-24, available at <<https://ssrn.com/abstract=2692640>> or <<http://dx.doi.org/10.2139/ssrn.2692640>>, at 24; H. C. Bofinger, 'Air Transport in Africa: A Portrait of Capacity and Competition in Various Market Segments', in R. Newfarmer, J. Page, F. Tarp (eds.), *Industries without Smokestacks: Industrialization in Africa Reconsidered* (Oxford: Oxford University Press 2018), at 130. A typical scheme, in line with the Chicago Convention, is an audit of the regulatory oversight system of third countries in terms of its compliance with ICAO standards.

⁴⁴ Annex to Regulation 2111/2005, *supra* note 33.

⁴⁵ J. Scott, *supra* note 40, at 107.

grammes.⁴⁶ A similar mechanism arises in the case of Aviation Security Validation.⁴⁷ Unlike foreign schemes, which rely on state-level audits, the EU mechanism places specific obligations directly on operators. In addition, the EU reserves the right to commission an on-site verification at the airport from which ACC3 handles EU-bound cargo. Some aviation authorities rejected the EU's requirements from the outset and were reluctant to grant validators working on behalf of the EU to screening facilities.⁴⁸

3.3. Foundations and legitimate concerns behind EU Aviation Regulations

One of the factors that strengthen the regulations in question is their subject matter. In addition to safety and security, they relate to the protection of passenger rights and the fight against climate change. In principle, questioning the need for caution or strengthening action in these areas may lead to social discontent. However, when considering the issue of permissibility, Valdes points out that the 'degree of tolerance will vary in accordance with the particularities of the case and the nature of the subject matter'.⁴⁹ According to this logic, extraterritorial elements in security measures are accepted more readily than in the area of environmental protection due to a link with 'generally held values'.⁵⁰

The link between instruments and legitimate concerns should also be noted, particularly in the case of measures on air transport safety or security. For instance, stringent requirements for consignments originating from outside the EU were seen to be necessary in light of growing concerns about security scrutiny at airports serving as gateways to Europe.⁵¹ The ACC3 system was introduced in the wake of the 2010 bomb incident at East Midlands Airport (United Kingdom).⁵² This may be the most striking use of a focusing event, given the fact that partial harmonisation has been achieved even despite security (not

⁴⁶ ART.235, Section II of Annex 2 to Commission Regulation 452/2014, *supra* note 12.

⁴⁷ Commission Implementing Regulation 1082/2012, *supra* note 27.

⁴⁸ 'Russia, EU tussle over ACC3 security regulation', *Air Cargo World* (9.7.2014), available at <<https://aircargoworld.com/news/russia-eu-tussle-over-acc3-security-regulation-9903/>>; 'Getting the ACC3 together', *Cargo Airports & Airline Services* (4.4.2018), available at <<https://www.caasint.com/issue-article/getting-the-acc3-together/>>; Airlines for Europe, 'Air Cargo in 2021: Fighting the COVID-19 Pandemic & Key Policy Challenges', *COVID-19, Position Paper* (22.1.2021), available at <<https://a4e.eu/publications/air-cargo-in-2021-supporting-the-covid-19-crisis-and-key-policy-challenges/>>.

⁴⁹ P. A. Valdes, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (Hague: Eleven International Publishing 2015) 205-206.

⁵⁰ *Ibid.* Valdes is quoting here A. V. Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34 *The International and Comparative Law Quarterly* 1985, at 734.

⁵¹ M. Hallside, L. Rosen, M. O'Connor, E. Corry, P. Elliott, 'Implementing Regulation 1082/2012 amending Commission Regulation 185/2010 in respect of EU Aviation Security Validations. Evaluation Report', *Innovative Compliance and DLA Piper* (2012), at 56.

⁵² J. Argomaniz and P. Lehr, 'Political Resilience and EU Responses to Aviation Terrorism', 39 *Studies in Conflict & Terrorism* 2016, p. 370. The bomb was discovered thanks to intelligence, after a flight on one passenger plane and two cargo planes and a security check. A similar device was intercepted in Dubai.

limited to aviation security) being a sensitive element of the debate between the EU Member States.⁵³ Similarly, the proposal on the common Air Safety List was linked to a legislative action aimed at reinforcing a worldwide effort to reduce accidents.⁵⁴ Here, the European Commission drew particular attention to the catastrophe in Sharm-el-Sheikh in January 2004, when a plane heading to Paris, with many French tourists onboard, crashed into the Red Sea. The investigation revealed that the airline involved was already banned in Switzerland due to safety concerns but it still had access to EU airports.⁵⁵ This situation thus exposed problems in terms of international cooperation and the flow of information between regulators and the public.

The significance of territorial extension embedded in the EU legislative framework cannot be viewed in isolation from the market size of the EU, which gives teeth to its requirements.⁵⁶ It is one of the most lucrative aviation markets in the world and home to many hub airports. Therefore, access to European routes and European citizens is essential for international carriers. This material base translates into strong leverage when it comes to market regulation (as well as to negotiating agreements). Conditionality for accessing EU airspace becomes an incentive to raise standards and invest additional resources. Dąbrowski also highlights the issue of the EU's growing technical expertise resulting from its efforts made to achieve a single aviation market with stringent, unified norms. This expertise puts the EU in a better position to substantiate and export these norms abroad.⁵⁷ The EU's leading position also means that any failure to comply with its requirements, in addition to incurring direct losses, may lead to a further negative impact on operations abroad, e.g. loss of reputation, outflow of tourists from the affected country.⁵⁸ However, this shifts the discussion to other elements of the global reach and the indirect mechanism of rule projection, beyond the scope of this contribution.⁵⁹

The elements outlined above affect the perception of EU law outside its borders and the actual reach of the law. Nevertheless, EU legislation may still and, in some cases, has already attracted opposition on the basis of extraterritoriality and violation of the sovereignty principle. One clear example of this is the case of aviation emissions, in which the EU has faced strong pressure, as well as threats of retaliation, if it does not withdraw from the new rules.⁶⁰

⁵³ Ibid, at 372.

⁵⁴ Recital 19 of Regulation 2111/2005, *supra* note 33.

⁵⁵ Proposal, *supra* note 17. Other incidents were also included in the discussion; see H. Kassim and H. Stevens, *supra* note 9, p. 138.

⁵⁶ M. Dąbrowski, *supra* note 6, 138, 143.

⁵⁷ Ibid., at 138.

⁵⁸ These and other effects are discussed in Valdani, Vicari & Associati, 'Evaluation of Regulation 2111/2005 on the establishment of a Community list of air carriers subject to an operating ban in the Community. Final report' (Luxembourg: Publications Office of the European Union 2019).

⁵⁹ For further information, see S. Lavenex, *The Power of Functionalist Extension: How EU Rules Travel*, 21 *Journal of European Public Policy* 2014; M. Cremona, J. Scott, *supra* note 40.

⁶⁰ A. Vihma, H. Van Asselt, 'The Conflict over Aviation Emissions. A Case of Retreating EU Leadership?' 150 *Finnish Institute of International Affairs Briefing Paper* (February 2014), 3-4, available at <<https://mediamanager.sei.org/documents/Publications/Climate/FIIA-2014-EU-aviation-emissions.pdf>>; J. Hartmann, 'A Battle for the Skies: Applying the European Emissions

Other provisions have also given rise to reluctance, including aviation security standards which require EU validators to be allowed to inspect screening facilities at foreign airports.⁶¹ However, to assess fully the EU regulatory action, it is also important to highlight elements enabling a move toward a more cooperative model of relationships with other countries. For this purpose, the following analysis draws on two concepts present in the discussion on EU governance and its global reach. Namely, *safety valve* and *penalty default*.

3.4. Safety valve and penalty default

The term (*jurisdictional*) *safety valve* appears in literature to describe provisions introduced 'to prevent jurisdictional over-reach and to facilitate cooperation between States'.⁶² As a result, valves can help to avoid conflicts. Scott used the term when discussing how the EU can appraise the jurisdictional reasonableness of legislation incorporating novel extraterritorial triggers, where 'EU and third country assertions of jurisdiction have a strong potential to overlap'.⁶³ In doing so, she distinguishes the mechanisms of 'contingency' and 'contextuality'. In the case of aviation legislation, we are dealing primarily with the first mechanism. It provides for the disapplication of requirements where equivalent or adequate measures are already in place. Thus, safety valves imply jurisdictional restraint in the case where robust security systems can already be found, the security threat is satisfactorily addressed, or passengers are given compensation and assistance under foreign law. The appropriate regulator may then determine a satisfactory level of protection given the objectives pursued by the legislation and even facilitate the bureaucratic procedures.

For instance, Commission Implementing Regulation 1082/2012 provides for the possibility of equivalence on the part of third countries or mutual recognition of cargo security systems when there is little concern.⁶⁴ In addition, ACC3 followed a risk-based approach to security controls which involves easing the

Trading System to International Aviation', 82 *Nordic Journal of International Law* 2013, 212-214.

⁶¹ 'Russia, EU Tussle over ACC3 Security Regulation', *Air Cargo World* (9.7.2014), available at <<https://aircargoworld.com/news/russia-eu-tussle-over-acc3-security-regulation-9903/>>; 'Getting the ACC3 Together', *Cargo Airports & Airline Services* (4.4.2018), available at <<https://www.caasint.com/issue-article/getting-the-acc3-together/>>; Airlines for Europe, 'Air Cargo in 2021: Fighting the COVID-19 Pandemic & Key Policy Challenges –', *COVID-19, Position Paper* (22.1.2021), available at <<https://a4e.eu/publications/air-cargo-in-2021-supporting-the-covid-19-crisis-and-key-policy-challenges/>>.

⁶² J. Scott, 'The New EU "Extraterritoriality"', 51 *Common Market Law Review* 2014, at 1365.

⁶³ *Ibid.*, at 1377.

⁶⁴ In the first case, the Commission may recognise a validation granted by authorities/validator under the jurisdiction of the third country or international organisation, whereas, in the latter, the European Commission establishes the full exclusion of states with robust security measures from the ACC3 programme. See DG MOVE, 'Focus on ACC3 requirements. Answers to the most frequently asked questions on EU regulations for inbound air cargo and mail', *European Commission* (21/02/2014), available at <<https://ec.europa.eu/transport/sites/transport/files/modes/air/security/cargo-mail/doc/qa1082v11.pdf>>; European Commission, 'Air. From non-EU countries', *Mobility and Transport – European Commission*, available at <https://ec.europa.eu/transport/modes/air/security/cargo-mail/non-eu_en>.

requirements in locations considered to be of lesser risk. On a similar basis, Directive 101/2008 included an option for disapplying rules for incoming flights if they are subject to an emission charge elsewhere,⁶⁵ as well as for their revision in light of future bilateral agreements or changes in the international regime.⁶⁶ The second example makes it clear that safety valves will not eliminate all jurisdictional conflicts. However, in many situations, they may lead to beneficial cooperation.

In addition to achieving the stated objectives, the use of safety valves can 'create opportunities for continuing dialogue between the EU and third country regulators and entities, setting in train a discursive process rather than an emphatic, one-sided and uncompromising "extraterritorial" application of EU rules'.⁶⁷ As Scott points out, the adequacy assessment itself intensifies contact between operational units.⁶⁸ This also makes the legal provisions more palatable. In line with this perspective, it can be noted that the European Union repeatedly emphasises its proactive approach and readiness for dialogue with regard to sector-specific regulations.⁶⁹ In particular, aviation safety is considered by EU officials to be a 'catalyst' for developing stronger ties with third countries in this domain.⁷⁰ In the case of ASL, the provisions for consultation are incorporated into the implementing rules.⁷¹ The legislation is complemented by technical assistance and operational support within the framework of programmes initiated by the EU institutions or within initiatives launched by other international organisations (e.g. ICAO Aviation Safety Implementation Assistance Partnership).⁷²

Despite the cooperative potential of safety valves, both the term and its definition bring to the fore primarily the protective elements of the measures and necessary limits to the global reach of EU law. However, when considering

⁶⁵ Art. 1 para.18, Directive 2008/101/EC, *supra* note 13.

⁶⁶ *Ibid.* See, also, J. Scott, *supra* note 40, at 110.

⁶⁷ J. Scott, *supra* note 62, at 1365.

⁶⁸ *Ibid.*, at 1377.

⁶⁹ European Commission, 'Aviation Safety: Commission removes all airlines from Indonesia from EU Air Safety List', *Mobility and Transport – European Commission* (14.06.2018), available at <https://ec.europa.eu/transport/modes/air/news/2018-06-14-commission-updates-eu-air-safety-list_en>; European Commission, 'Aviation Safety: Commission adopts new EU Air Safety List', *Press release* (2 June 2020), available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_981>.

⁷⁰ European Commission, Report from the Commission to the Council and the European Parliament on the application of Regulation 2111/2005 regarding the establishment of a Community list of air carriers subject to an operating ban within the Community and informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC SEC(2009)1735, COM(2009)710 final (Brussels, 11.1.2010), at 9, available at <<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:52009DC0710>>.

⁷¹ Art. 3 of Commission Regulation (EC) 473/2006 of 22 March 2006 laying down implementing rules for the Community list of air carriers which are subject to an operating ban within the Community referred to in Chapter II of Regulation (EC) No 2111/2005 of the European Parliament and of the Council OJ [2006] L 84/8, 23.3.2006.

⁷² See EASA, 'Technical Cooperation Projects, EASA', available at <<https://www.easa.europa.eu/domains/international-cooperation/technical-cooperation-projects>>; EASA, 'Worldwide initiatives', available at <<https://www.easa.europa.eu/domains/international-cooperation/technical-cooperation/worldwide-initiatives>>; see, also, M. Dąbrowski, *supra* note 6, 144-145.

this phenomenon, it is also important to look at the more proactive side of the EU legal arrangements. In this regard, it is worth recalling the concept of *penalty default* which originates from contract law, developed further by Karkkainen.⁷³ Sabel and Zeitlin used it in the context of experimentalist governance.⁷⁴ The regulatory penalty default, relevant here, denotes a type of destabilisation mechanism built into the law to create an incentive for partners to engage in reinventing the regulatory system. Karkkainen defines it as 'a harsh or quasi-punitive regulatory requirement that applies as the default rule if parties fail to reach a satisfactory alternative arrangement'.⁷⁵ Thus, working indirectly and 'imposing rules sufficiently unpalatable to all parties' motivates them to propose an alternative.⁷⁶ Usually, the threat implies a loss of control over their own fate.⁷⁷

Applying this concept to sector-based regulations highlights that the legislative framework created by the EU is imposing stringent requirements on foreign partners and claiming rights to ongoing monitoring outside its territory and not only enforcing the appropriate level of protection. It also provides the potential to instigate further progress in air transport solutions. From this perspective, contentious measures, and intrusion into the competencies of foreign authorities, may be seen as additional incentives for non-EU states to undertake self-regulation, strengthen monitoring procedures, or make other changes to the international system. In such cases, EU procedures become a mere formality (e.g. TCO Authorization based on the documentation provided); they are not exercised or they are retracted altogether by way of bilateral agreement. Consequently, third countries retain more control. It is only when they fail to act that foreign entities will be subject to a greater regulatory burden (and its potential negative consequences).

The prime example of penalty default in the domain remains the attempt to include aviation activities in the EU ETS, as described by Scott.⁷⁸ This is a special case also because it stemmed from a failure to reach a global inter-governmental agreement in the ICAO. Only then did the EU decide to step in.

⁷³ The regulatory penalty default has broader functions than the version in contract law whereby the notion refers to 'a gap-filling interpretive rule that intentionally imposes a harsh outcome on one or more parties in order to create an incentive for the parties to contract around the default rule in favour of an explicit alternative arrangement better tailored to their particular circumstances'. B.C. Karkkainen, 'Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism', 87 *Minnesota Law Review* 2003, see, also: I. Ayres, R. Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules', 99 *The Yale Law Journal* 1989.

⁷⁴ C. F. Sabel, J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', in C. F. Sabel, J. Zeitlin (eds.) *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford: Oxford University Press 2010), 1.

⁷⁵ B. C. Karkkainen, *supra* note 68, at 944.

⁷⁶ C. F. Sabel, J. Zeitlin, *supra* note 74, 14.

⁷⁷ B. Rangoni, J. Zeitlin, 'Is Experimentalist Governance Self-Limiting or Self-reinforcing? Strategic Uncertainty and Recursive Rulemaking in European Union Electricity Regulation', 15 *Regulation & Governance* 2020, at 823.

⁷⁸ J. Scott, 'EU Global Action on Climate Change and Regulatory Penalty Defaults', *SSNR* (4 November 2011) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954667>.

Consequently, as Birchfield puts it, the cost of no agreement was raised.⁷⁹ Nevertheless, the traits are also inserted in other regulations. The effect described above may, in particular, be due to the exemption provisions on alternative means of compliance or equivalence. In practice, a similar effect with regard to TCO Authorization may arise from recourse to the notion of 'sufficient level of confidence' and the possibility of accepting the differences in the operational and safety standards of the third country, if they are justified.⁸⁰

It follows from all the above that European policymakers test the boundaries of permissible action and at the same time define the conditions under which it is possible to obtain an exemption. I would argue that the elements discussed above overlap and are mutually reinforcing, in an effort to raise technical standards and to actively encourage cooperative problem-solving in the domain of air transport. The inclusion of security valves within the legislation facilitates conflict prevention and paves the way for further international cooperation. Whereas considering the deeper incentive structure created by penalty defaults, one can see the additional quality of the regulatory framework and the construction of these 'escape routes': an orientation towards inducing progress in the global aviation system.⁸¹

4. GLOBAL REACH AND EU POSITION IN INTERNATIONAL AVIATION

Thus far, the paper has discussed the design of EU regulations which address specific issues and contain aspects of exerting an influence over the contemporary aviation system. We now turn to the second identified dimension of EU regulatory action – building a position in the international system governing air transport. To this end, the legislation in question should be considered in the context of the EU External Aviation Policy, which was formally pursued from 2002. Framework documents were published under subsequent Commissions in 2005, 2012, and 2015.⁸² The main thrust of the external strategy is focused on international agreements with neighbouring countries and leading partners. However, Article 4 of the Treaty on the Functioning of the European Union

⁷⁹ V. L. Birchfield, 'Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions', 22 *Journal of European Public Policy* 2015, at 1277.

⁸⁰ ART. 200, Section II of Annex 2, Regulation 452/2014, *supra* note 12.

⁸¹ The notion of 'escape routes' used after J. Scott, *supra* note 78.

⁸² Communication from the Commission – Developing the agenda for the Community's external aviation policy, COM/2005/0079 final, Commission of the European Communities (Brussels, 11.3.2005), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0079&from=EN>>; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU's External Aviation Policy – Addressing Future Challenges, 27.9.2012, COM(2012) 556 final, European Commission (Brussels, 27.9.2012), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0556&from=EN>>; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An Aviation Strategy for Europe, COM(2015) 598 final, European Commission (Brussels, 7.12.2015), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0598&qid=1622308007749&from=EN>>.

(TFEU) provides that transport is a shared competence.⁸³ Based on the decision of the European Court of Justice in the *Open Skies* cases, the subject of EU external exclusive competence only includes airport slots, computer reservation systems, and intra-EU fares and rates. To negotiate complete air services agreements (ASAs), the Commission must obtain a mandate from the Member States granted on a case-by-case basis.⁸⁴ This seems to go against the overall ambition of the European Commission to create and maintain an image of the Union as a global leader in civil aviation.⁸⁵

Against this background, the application of EU law outside its territory, as examined in Section 3, constitutes a significant supplement to the formal activity of the European Commission on the international stage and, as such, an innovative way of implementing external engagement. In direct terms, legislation has centralised parts of supervisory practices concerning foreign entities present on the common market. Hence, it provided turf and novel opportunities for establishing contact between the EU and the oversight authorities of third countries. EU schemes involve continuous monitoring of actors and regulators, which fosters networking. In addition to this, EASA's targeted technical assistance and projects are focused on capacity building and consulting for aviation authorities in third countries.⁸⁶

Furthermore, EU Member States do not agree with ceding to the Union supervisory powers about national air carriers or local air navigation service providers. In this regard, taking over the certification of foreign entities is an opportunity for the EU to mark its controlling presence in areas traditionally managed by national states. It now provides a testing ground for the capabilities of the EU bodies and allows the Commission, as well as the EASA, to acquire data and develop further expert knowledge, particularly in technical matters. In future, this may foster further integrations of EU internal policy.⁸⁷ It also has

⁸³ Art. 4 of the Treaty on the Functioning of the European Union, OJ [2012] L 326, 26.10.2012; M. Vaugeois, 'International Civil Aviation Organization (ICAO): The Development of the Position of the EU in International Aviation', in R. A. Wessel, J. Odermatt, *Research Handbook on the European Union and International Organizations*, (Northampton: Edward Elgar Publishing 2019), 222.

⁸⁴ J. Balfour, *supra* note, 7, at 448.

⁸⁵ The EU's External Aviation Policy, *supra* note 75, at 14; An Aviation Strategy for Europe, *supra* note 75, at 10; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Aviation: Open and Connected Europe, COM(2017) 286 final, European Commission (Brussels, 8.6.2017), at 2, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0286&qid=1622308348990>>.

⁸⁶ EASA, 'Technical Cooperation Projects, EASA', available at <<https://www.easa.europa.eu/domains/international-cooperation/technical-cooperation-projects>>; EASA, 'Worldwide initiatives', available at <<https://www.easa.europa.eu/domains/international-cooperation/technical-cooperation/worldwide-initiatives>>; see, also, M. Dąbrowski, *supra* note 6, 144-145.

⁸⁷ As early as in 2002, the EC stated: 'With Community initiatives today covering most aspects of air transport, from safety and security to passenger protection, it has become increasingly inappropriate for international relations to be handled by each Member State individually.' See Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy, COM(2002) 649 final, Commission of the Eu-

external relevance. Its expert image significantly raises the overall profile of the European Union as a player in international aviation, in line with the European Commission's long-term strategic objectives.⁸⁸ These elements can therefore translate into greater influence and improve the EU's position on the global stage, despite the formally constraining character of the Chicago system.

5. CONCLUSION

This paper has examined elements of extraterritorial effects embedded in the EU legislative framework on civil aviation focusing on six specific EU aviation regulations. The analysis has revealed that the controversial aviation emissions directive project, which intended to cover all external flights taking off and landing in the EU, although distinct, should not be perceived as an isolated case in the domain of air transport. The EU has repeatedly made recourse to measures extending its regulatory jurisdiction and the reach of law beyond its territory. Aspects of this can be seen in areas ranging from air traffic management to passenger rights. In accordance with Scott's distinction made in terms of the types of global reach, these actions are considered to represent 'territorial extension' rather than a form of genuine extraterritoriality. The analysis reveals that the EU's activity, although rooted in traditional means and referring to ICAO universal standards as a baseline, has also aimed actively to improve the norms and procedures that govern international aviation or to provoke action, when the global forum has proven to be slow-moving. On many occasions, the legislation adopted places requirements on both market participants and on foreign authorities responsible for their oversight. In some cases, it is simply a matter of certification. In others, the EU goes further and constructs more elaborate instruments to take account of the fact that the conduct occurs abroad, leading to tensions and opposition. The legislation in question repeatedly tests the boundaries of EU authority and broadens the scope of application of its law. At the same time, attention should be paid to the conditions under which it is possible to obtain an exemption. As envisaged by the legislation, escape routes pave the way for a more cooperative model of relations with other countries and incentivise partners to make further changes across the system. Finally, this contribution demonstrates that, in addition to strengthening the regulatory framework of the sector, unilateral action can reinforce the EU as a global player. The enforcement of the laws and the experience gained reinforce its overall position and support further demands for a formal place in the international air transport governance system.

European Communities (Brussels, 19.11.2002), at 2, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0649&from=EN>>. In the context of taking over tasks from regional organisations, see H. Kassim, H. Stevens, *supra* note 9, 152-153.

⁸⁸ *Ibid.*, at 138. M. Dąbrowski, *supra* note 6, at 133.

TERRITORIAL EXTENSION OF EU LAW THROUGH PIPELINES: NORD STREAM 2 AND THE EVOLUTION OF THE GAS DIRECTIVE AMENDMENT

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1. INTRODUCTION

An international entity is not allowed to exercise its powers outside its territory as this is against the principle of territoriality, which is one of the tenets of international law¹ to which the European Union is subject.² The *ratione loci* scope of EU treaties extends to the combined territories of the EU Member States, as indicated in Article 52 TEU, and to those specified in Article 355 TFEU. If EU law applied to territories other than those identified by primary law, this would be an example of the extraterritorial application of Union law. At times, the territorial extension of EU law may be confused with the extraterritorial application of this body of law. The distinction is important, as the latter is not permitted under international law, while the former is legal to the extent that there is a territorial link to the EU Member States. One of the first areas in which the issue of the alleged extraterritorial application of EU law emerged in the case law of the EU Court of Justice (ECJ) is that of competition law.³ Another relevant case concerned one of the instruments designed to combat climate change, the

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¹ See F. A. Mann, *The Doctrine on Jurisdiction in International Law* (Leyden: A. W. Sijthoff 1964) and F. A. Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* (The Hague: M. Nijhoff 1985); I. Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 8th edition 2012); K. M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London: Kluwer Law International 1996); J. Crawford, *Brownlie's Principles of Public International Law*, (Oxford: Oxford University Press, 9th edition 2019).

² There are cases where extraterritorial jurisdiction is exceptionally triggered by special circumstances in the application of principles of international law, such as personality, protective or universality principles. However, these exceptions are not relevant for the purpose of this paper and will not be discussed further. For more information on the circumstances able to trigger a state's jurisdiction over situations that occur outside its borders, see J. Wouters and N. Pineau, 'L'extra-territorialité du droit de l'Union européenne au regard du droit international public', in F. Picod and E. Dubout (eds.), *Extraterritorialité et droit de l'Union européenne* (Bruxelles: Bruylant 2021 forthcoming).

³ ECJ, Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to 129/85, *A Ahlstrom Osakeyhtiö v Commission (Wood Pulp)*, [1988] ECLI:EU:C:1988:447; ECJ, Case C-48-69 *ICI v Commission (Dyestuffs)*, [1972] ECLI:EU:C:1972:70; ECJ, Case T-102/96 *Gencor v Commission*, [1999] ECLI:EU:T:1999:65, para. 90; ECJ, Case T-286/09, *Intel Corp. v Commission*, [2014] ECLI:EU:T:2014:547, para. 40; ECJ, Case C-413/14 P, *Intel Corp. v Commission*, [2017] ECLI:EU:C:2017:632, 44-49, all available at <http://curia.europa.eu/jcms/jcms/j_6>. See, also, B. Zelger, 'EU Competition Law and Extraterritorial Jurisdiction: A Critical Analysis of the ECJ's Judgement in Intel', 16 *European Competition Journal* 2020, 613-627.

so-called EU Emission Trading Scheme,⁴ whose instituting legislation was considered compatible with international law.

The extraterritorial application of competition law in the energy domain has not been fully explored by legal scholars. However, the issue remains politically salient, particularly when, as in the case at hand, it has repercussions on the operation of major gas infrastructures, such as the *Nord Stream 2* (NS2) pipeline. Consequently, it is interesting to examine the case study concerning a piece of secondary law in the energy field, proposed by the Commission and contested by the Council. This is Directive 2019/692 (2019 GMD),⁵ amending the so-called 'Gas Market Directive' 2009/73/EC (2009 GMD),⁶ which was adopted in the framework of the 2009 EU 'Third Energy Package' (TEP). The 2009 GMD was designed to ensure the completion of the internal gas market,⁷ but has clear implications for the security of energy supply. The fundamental competition rules contained therein were only applicable to gas pipelines connecting EU Member States, while the 2019 GMD is now applicable to infrastructures connecting Member States with third countries. This amendment affects pipelines that are currently under construction, such as NS2, which, upon completion, is supposed to allow gas imports from Russia to Germany.

The question raised in this paper is whether the Commission's proposal, extending the *ratione loci* scope of the Directive to gas transmission lines (to and from third countries) in the Exclusive Economic Zones (EEZ) of the Member States, can be considered an example of the extraterritorial application of EU law (unlawful under international law) or, on the other hand, an example of the territorial extension of EU law (lawful under international law). As will be shown, the Commission's proposal is considered by the Council to be in violation of some of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) regulating the jurisdiction of states in their EEZ and would therefore not be approved. It is submitted here that the application of the 2009 GMD to the offshore parts of the pipelines can be considered a territorial extension of EU law, due to the connection of the external pipelines with Member States' territories.

The paper will begin with a brief description of the context in which the changes to the 2009 GMD were proposed by the Commission. In particular, the NS2 project, with its significant implications for the energy security of EU Member States, will be briefly illustrated (section 2). Next, in section 3, the Commission's recommendation to the Council to open the negotiation of an agreement

⁴ ECJ, Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change (ATAA)*, [2011] ECLI:EU:C:2011:864, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0366>>.

⁵ Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas [2019] OJ L 117/1 (hereafter: '2019 GMD').

⁶ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94 (hereafter: '2009 GMD').

⁷ The legal bases are found in Articles 47(2), 55 and 95 of the Treaty establishing the European Community (now Articles 53(1), 62 and 114 TFEU).

with Russia on the NS2 project, with the intention of applying the EU *acquis* to the pipeline, will be discussed. Sections 4 and 5 will address the rationale of the Commission's proposal to amend the 2009 GMD and, in particular, the extension of EU energy market principles to transmission lines connecting third countries to Member States and up to their EEZ; section 5 will also then explain the position of the Council's Legal Service on the extent to which the proposal is in conflict with the principle of territoriality, with UNCLOS, and with the division of competences between the EU and its members. Next, the 2019 GMD will be assessed, examining its possible effects on the legal position of foreign energy operators (section 6). It is argued that the Directive has reinforced the set of mechanisms envisaged by the EU to ensure both respect of internal gas market principles and the security of supply. Section 7 will then consider the legal implications of the 2019 Directive on Member States' power to conclude international agreements concerning transmission pipelines in future and the enhanced role of the Commission in safeguarding EU energy security. Concluding remarks will follow in section 8.

2. THE RELEVANCE OF NORD STREAM 2 FOR THE EU'S SECURITY OF ENERGY SUPPLY AND THE IMPORTANCE OF FREE COMPETITION IN THE EU GAS MARKET

The EU is strongly reliant on the import of fossil fuels from abroad: in particular, approximately 40% of its gas is imported from Russia.⁸ Germany is not only the largest purchaser of gas among the EU Member States, but also the largest purchaser of Russian gas, with long-term contracts extending as far as 2034.⁹ Given that Russia has already interrupted in the past the supply of gas to Ukraine for foreign policy purposes, their dependence on the supply of gas from Russia places Member States in a vulnerable position.

The construction of the NS2 pipeline, which is nearing completion, increases the level of dependence on Russia.¹⁰ NS2 is not 'just an economic project'.¹¹ Indeed, it has strong geopolitical repercussions on relationships between the EU and Russia, the EU and its Eastern neighbourhood, and even between EU members.¹² It is projected to pump an annual volume of 55 billion cubic metres

⁸ Eurostat, 'EU Imports of Energy Products – Recent Developments', available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_imports_of_energy_products_-_recent_developments>. The EU imports almost 60% of its fossil fuels from abroad. See Eurostat, 'Energy Production and Imports', available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports#Imports>.

⁹ K. O. Lang and K. Westphal, *infra* note 12, at 10.

¹⁰ The 'Nord Stream 2' pipeline project will be laid alongside the Nord Stream 1 pipeline in the Baltic Sea; as a result, gas will be imported directly from Russian natural gas fields to Germany.

¹¹ A. Rettman, 'Merkel: Nord Stream 2 is "Political"', *EUobserver* (Brussels, 11 April 2018).

¹² K. O. Lang and K. Westphal, 'Nord Stream 2 – A Political and Economic Contextualisation', 3 *SWP Research Paper* (2017); A. V. Belyi and A. Goldthau, 'Between a Rock and a Hard Place: International Market Dynamics, Domestic Politics and Gazprom's Strategy', 22 *EUI Working Paper RSCAS* 2015; A. Bros, T. Mitrova and K. Westphal, 'German-Russian Gas Relations – A Special Relationship in Troubled Waters', *SWP Research Paper* (2017).

of natural gas into the EU, undermining energy security inside the so-called 'Energy Union'.¹³ The new pipeline will join the existing gas import routes from Russia (the *Yamal* and *Brotherhood* pipelines).

It should be noted that NS2 is a 'diversionary pipeline': it does not increase the energy supply but merely redirects gas – together with *Nord Stream 1* – from the *Brotherhood* pipeline into the EU, via another route.¹⁴ The new project was designed by Russia to cut Ukraine off from the gas export route, following the 2014 crisis caused by the violation of Ukraine's territorial integrity. Although Russia and Ukraine recently concluded the new 'Gas Transit Deal' for the 2020-2024 period,¹⁵ the completion of NS2 will jeopardise the relationship between these two states. Once the pipeline is completed and used to its full capacity, the transit of gas from Russia through Ukraine is likely to be reduced to 5 bcm per year (from 2022 onwards).¹⁶ If, on the other hand, NS2's capacity is not fully utilised due to amendments to the 2009 GMD, Russia will still need to route its gas through Ukraine, entailing considerable economic advantages for the latter country.

Free competition is at the foundation of the EU gas market. The proper functioning of the internal gas market is also closely connected to the *security of supply*. The International Energy Agency has described the latter concept as 'the uninterrupted availability of energy sources at an affordable price'.¹⁷ In other words, ensuring security of supply means preparing well for a possible disruption.¹⁸ Since the import of gas from third countries has ramifications in the field of competition law, the application of this body of law to pipelines importing gas into the EU is of extreme importance. It can contribute to avoiding the consolidation and abuse of dominant positions as well as to curbing the risk of dependence on an external source of energy, thereby strengthening the EU's position in relation to external gas suppliers. The consolidation of a dominant position on the EU energy market by energy suppliers located in third countries may breach EU internal market rules.

Gazprom, a public joint stock company under majority control by the Russian state, is the dominant gas supplier in a number of Central and Eastern European countries and also the sole (100%) owner of the undertaking specifically

¹³ A. A. Marhold, 'Externalising Europe's Energy Policy in EU Free Trade Agreements: A Cognitive Dissonance between Promoting Sustainable Development and Ensuring Security of Supply?', 3(1) *Europe and the World: A Law Review* 2019, 1-18.

¹⁴ A. Riley, 'A Pipeline Too Far? EU Law Obstacles to Nordstream 2', *International Energy Law Review* (March 2018), 1-25.

¹⁵ The deal was facilitated by France and Germany through the so-called 'Normandy Four Format', formed by the President of Russia, the President of Ukraine, the German Chancellor and the President of France.

¹⁶ S. Pirani, J. Sharples, K. Yafimava and V. Yermakov, 'Implications of the Russia-Ukraine Gas Transit Deal for Alternative Pipeline Routes and the Ukrainian and European Markets', *The Oxford Institute for Energy Studies, Energy Insight* 65 (March 2020).

¹⁷ International Energy Agency, 'What is Energy Security?' (2 December 2019), available at <<https://www.iea.org/areas-of-work/ensuring-energy-security>>.

¹⁸ European Commission, 'Communication from the Commission to the European Parliament and the Council on the short term resilience of the European gas system, Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015' (Brussels, 2 March 2015) COM(2014) 654 final/2, 26.

established to construct the Nord Stream pipeline system. In 2018, binding obligations to enable the free flow of gas at competitive prices in Central and Eastern European gas markets were imposed on the Russian company by the Commission, pursuant to Article 9 of the EU's Antitrust Regulation no. 1/2003.¹⁹ Previously, the Commission had made the following statement: 'All companies doing business in Europe have to respect European rules on competition, *no matter where they are from*' and that the 'obstacles created by Gazprom (...) stand in the way of the free flow of gas in Central and Eastern Europe' (emphasis added).²⁰ At the time, the Commission's actions were defined by one scholar as 'a brazen step to export EU competition laws to Russia or in other words, the application of EU competition laws extraterritorially'.²¹

Back then, the 2009 GMD was only applicable to interconnectors crossing or spanning a border *between Member States* for the sole purpose of connecting the national transmission systems of those Member States, thus excluding pipelines *to and from third countries*.²² This was a legal obstacle to the reach of EU competition rules laid down by the 2009 GMD. In order to solve this problem, the Commission attempted to start negotiations with the Russian Federation on the operation of the new pipeline.

3. THE INAPPLICABILITY OF THE GAS MARKET DIRECTIVE TO PIPELINES TO AND FROM THIRD COUNTRIES AND THE COMMISSION'S ATTEMPT TO NEGOTIATE AN AGREEMENT WITH RUSSIA ON NORD STREAM 2

When the construction of NS2 began, the 'Third Energy Package' (TEP) was the legal framework in force in the EU gas market. The 2009 GMD, which was part of the TEP, established quite a demanding liberalisation regime. The most significant obligations concerned, firstly, ownership unbundling for new infrastructures (the separation of energy supply and generation from the operation of transmission networks),²³ secondly, third party access to all transmission and

¹⁹ Commission Decision of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement – Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1; European Commission, 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' (Brussels, 24 May 2018), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921>.

²⁰ 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' (Brussels, 22 April 2015), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4828>.

²¹ P. S. Morris, 'Iron Curtain at the Border: Gazprom and the Russian Blocking Order to Prevent the Extraterritoriality of EU Competition Law', *European Competition Law Review* 2014, at 605.

²² Art. 2(17) 2009 GMD.

²³ Art. 9(1) 2009 GMD.

distribution pipelines through a system of periodic capacity auctions;²⁴ and, thirdly, the publication of transparent and non-discriminatory tariffs, pre-approved by the relevant national regulatory authority.²⁵ Without unbundling, regulated third party access and tariff regulation, the owner of a gas pipeline connecting third countries with the EU can effectively control access to the internal energy market (or parts thereof). As described in section 2, the 2009 GMD adopted a definition of ‘interconnector’ which excluded pipelines such as NS2 from its field of application.²⁶

In order to build major transit pipelines, long-term investment and a network of agreements between states or between states and enterprises are needed.²⁷ This set of agreements commonly constitutes the specific normative framework governing a particular trans-boundary project, whose offshore sections are not subject to national legislations. In the case of NS2, the pipeline was not to be built with EU or state funding, but only with the intervention of private investors. The builders had to comply with the procedures set out in the national legislations of the Baltic states which, in accordance with UNCLOS, regulate the issuing of permits for laying sub-sea pipelines in the EEZ and territorial sea of the countries concerned.²⁸ However, the governments of the transit countries did not follow the state practice of concluding an international agreement. It was therefore unclear whether EU Member States’ or Russian national jurisdiction should be applied to the offshore parts of NS2 lying *outside the territory* of the states concerned.

In 2015, the Commission took the following view: ‘As with any other pipeline in the EU, this pipeline [NS2] will have to fully respect EU law, in particular the [TEP]’.²⁹ The European Council took a similar stance and held that ‘any new infrastructure should entirely comply with the [TEP] and other applicable EU legislation as well as with the objectives of the Energy Union’.³⁰ On 9 June 2017, the Commission submitted its Recommendation to the Council on the opening of the negotiation of an agreement between the EU and the Russian Federation on the operation of the NS2 pipeline. The Commission considered at the time that the NS2 project could not contribute to the Energy Union objectives and that it could lead to a further concentration of supply routes. The problem was due to the following situation: while any onshore pipeline to transport gas coming through NS2 in Europe would have to comply fully with EU energy rules under the TEP, some of its offshore section, including its only

²⁴ Art. 32(1) 2009 GMD and Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems [2017] OJ L72/1.

²⁵ Art. 32(1) 2009 GMD.

²⁶ Ibid.

²⁷ D. Azaria, ‘Transit of Energy via Pipelines in International Law’, 110 *American Society of International Law Proceedings* 2017, 131-139.

²⁸ The last licence was granted by Denmark on 30 October 2019, almost three years after NS2 filed its application.

²⁹ European Commission, State of the Energy Union 2015, SWD (2015) 404 final, at 6.

³⁰ European Council meeting (17 and 18 December 2015), Conclusions.

entry point, lay outside the EU's jurisdiction.³¹ As a consequence, Russia could import gas inside the Union without complying with some fundamental obligations regulating competition in the EU energy market.

Surprisingly, the Council disagreed with the other institutions and decided not to follow the Commission's recommendation; furthermore, it considered the Commission's reasoning behind its support for opening the negotiation of the agreement to be unconvincing. In particular, the Commission had raised two alternative concerns as a justification for the envisaged negotiations with the Russian Federation: the need to avoid, on one hand, a legal void (according to which part of the pipeline was *unregulated*) and, on the other, a conflict of laws (according to which part of the pipeline was *overregulated* by conflicting laws).³² For the Council, the offshore parts of the pipeline would be subject to the relevant rules of international law, including the Law of the Sea;³³ the national laws of Russia and EU Member States would be applicable to the onshore parts of the infrastructure, based on the section of the pipeline in question.³⁴ Moreover, the Commission's point that 'applying two different legal regimes' to the same stretch of pipeline was risky was rejected.³⁵ The Council Legal Service explicitly stated that the 2009 GMD '[did] not apply to the Nord Stream 2 pipeline'.³⁶ In conclusion, the Council considered that the envisaged agreement did not fall into an area of exclusive Union competence.³⁷

It was not the first time that the Commission had tried to apply the aforesaid legislation to an import pipeline. One of the reasons why the *South Stream* construction remained uncompleted was that, according to the Commission, Member States with an interest in the project had to respect the EU *acquis*.³⁸ At the end of 2013, the Commission found that an agreement between Russia and EU Member States regulating the operation of that pipeline was not in line with some of the EU's internal market rules on competition.³⁹ An infringement procedure was opened against Bulgaria for its failure to respect the rules of the

³¹ European Commission, 'Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2' (Brussels, 9 June 2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1571>.

³² Council Legal Service Opinion, 'Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues' (27 September 2017), paras. 13 et seq.

³³ *Ibid.*, para. 16.

³⁴ *Ibid.*, para. 17.

³⁵ *Ibid.*, paras. 20 et seq.

³⁶ *Ibid.*, at 44 and 55. The Commission was already aware of the impossibility of unilaterally applying EU rules to third countries' national authorities. See 'Brussels Admits EU Law Does Not Apply to Nord Stream 2', Reproduced with permission by Energy Intelligence, 17(186) *Oxford Institute of Energy Studies Intelligence* (21 September 2017), available at <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/06/Brussels-Admits-EU-Law-Does-Not-Apply-to-Nord-Stream-2.pdf>>.

³⁷ *Ibid.*, at 61.

³⁸ A. Behrens, 'The Declared End of South Stream and Why Nobody Seems to Care', *CEPS Commentary* (5 December 2014).

³⁹ D. Keating, 'South Stream must be Renegotiated – Commission', *Politico* (5 December 2013), available at <<https://www.politico.eu/article/south-stream-must-be-renegotiated-commission-3/>>.

internal market.⁴⁰ Ultimately, Bulgaria decided to halt the construction of the pipeline.⁴¹ Russia's position in this matter was that EU legislation was not applicable to the pipeline insofar as the latter connected EU Member States with non-EU countries and that only an agreement between the states with an interest in the project was required.⁴²

It is worth stressing that some legal scholars hold the view that no EU authority has ever applied the provisions of the TEP to any of the existing pipelines comparable to NS2.⁴³ Existing import pipelines are governed by international agreements or contractual agreements which may or may not incorporate elements of the EU energy *acquis*.⁴⁴ However, this opinion fails to consider that EU energy policy cannot be managed in dissociation from the Common Foreign and Security Policy and without considering the implications of the choice of one Member State on the energy concerns of others, as we will see in section 7.

The Commission would have been better placed than individual Member States to negotiate those agreements, given that projects such as NS2 have implications for states other than those on whose territory (or EEZ) the pipeline is laid, and the Union is responsible for ensuring the functioning of the energy market and the security of energy supply, under Art. 194(1) TFEU. The project fell within the scope of EU energy policy. Union responsibility in the energy area is described in Article 4(2)(i) TFEU as an area of shared competence between the EU and the Member States. However, the division of competences in the Treaty reserves for the Member States the right to decide on the general structure of energy supply (Art. 194(2), second paragraph). Entrusting this power to the Commission would have had a pre-emptive effect and would have meant Member States had lost the exclusive power to conclude those treaties.⁴⁵

Having clarified the context and accounted for the Commission's failed attempt to obtain a mandate to negotiate an agreement with Russia on the operation of the NS2 pipeline, we will now examine the Commission's next initiative: the proposal made to amend the 2009 GMD to extend its application to pipelines coming from third countries.

⁴⁰ INFR(2014)2176, 'In compliance with EU Law of the Intergovernmental Agreement concluded with the Russian Federation for the construction and operation of the South Stream gas pipeline and the relevant award procedure', 2/06/2014, Formal notice, Art. 258 TFEU.

⁴¹ D. Keating, 'Bulgarian Government under Threat as South Stream Construction Is Stopped', *Politico* (10 June 2014), available at <<https://www.politico.eu/article/bulgarian-government-under-threat-as-south-stream-construction-is-stopped/>>.

⁴² A. Behrens, *supra* note 38.

⁴³ U. Lissek, 'Regulation of Nord Stream 2: Rule of Law, Equal Treatment and Due Process – A View from the Project Developer', *CEPS Commentary* (15 November 2016), at 2.

⁴⁴ L. Hancher, A. Marhold, 'A Common EU Framework Regulating Import Pipelines for Gas? Exploring the Commission's proposal to amend the 2009 Gas Directive', *Journal of Energy & Natural Resources Law* 2019, at 8.

⁴⁵ See, for further details, sections 5 and 7.

4. THE COMMISSION PROPOSAL TO APPLY THE GAS DIRECTIVE TO PIPELINES IN MEMBER STATES' EXCLUSIVE ECONOMIC ZONES

On 8 November 2017, the Commission issued a proposal⁴⁶ to amend the 2009 GMD. This proposal pursued the objective of completing the EU internal market of natural gas by eliminating obstacles deriving from the non-application of single market rules to gas pipelines to and from third countries and, consequently, contributing to legal clarity, security of supply, competitiveness of prices and sustainability, also avoiding possible distortions of competition.⁴⁷ It is therefore clear that the main objective related to the internal market, while the 'securitarian aspects' of the directive were subsidiary.

In its proposal, the Commission pointed out that EU law generally applies in the territorial sea and in the EEZ of Member States.⁴⁸ Subsequently, it noted that the 2009 GMD did not apply to pipelines connecting the EU with third countries. The Commission took the view that the new EU act should apply to the sections of pipelines laid in the territorial waters and EEZ of the Member States: this was considered to be in line with the territoriality principle. The change in scope was significant, as the proposed new act extended the application of EU competition rules on ownership unbundling, transparency, non-discriminatory tariffs and third party access to transmission systems (distributing gas to and from third countries) situated in their territorial waters as well as in their EEZ. In order to justify the extension in the scope of the Directive, the Commission maintained that 'there is a practice of applying core principles of the regulatory framework set out by the [2009 GMD] in relation to third countries, notably via international agreements concerning gas pipelines entering the European Union',⁴⁹ emphasising the need for coherence and for the uniform regulation of pipelines. The Commission envisaged the application of the Directive 'up to the border of EU jurisdiction'.⁵⁰

The issue at hand here is how to qualify the Commission's proposal to widen the Directive's scope of application. Firstly, a distinction must be made between the extraterritorial application and territorial extension of EU law. While the former is contrary to international law,⁵¹ the latter is not, due to the existence of a territorial link which justifies the application of EU law outside the territories of its members.⁵² The EU engages in the practice of territorial extension to provoke different types of legal or behavioural change, such as to incentivise a

⁴⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, COM(2017) 660 final of 08.11.2017.

⁴⁷ Commission proposal, Recitals (1) and (3).

⁴⁸ Ibid., Explanatory Memorandum, Context of the Proposal.

⁴⁹ Ibid.

⁵⁰ Ibid., recital (5) and Art. 1(1). See, also, L. Hancher, A. Marhold, *supra* note 44, at 11.

⁵¹ Except in some cases where the exercise of extraterritorial jurisdiction is triggered by special circumstances (see the Introduction).

⁵² J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *The American Journal of Comparative Law* 2014, 87-125.

high level of performance on the part of third country operators⁵³ or to shape their organisation and governance.⁵⁴ Interestingly, Scott suggested that the EU also uses territorial extension to encourage the conclusion of international or bilateral agreements.⁵⁵ In this case, it is probably the impossibility of concluding an EU agreement that led the Commission to propose the widening of the territorial scope of the Directive (in other words, it can be assumed that the Commission's attempt to extend the reach of EU law resulted from the impossibility of concluding an agreement with Russia, due to the Council's opposition).

According to the explanation given by the Commission during the Working Party on Energy of 12 December 2017, the pipeline's onshore landing in a Member State triggers Union jurisdiction to adopt legislation on offshore pipelines in the EEZ.⁵⁶ This position appears reasonable to the author and can be agreed. In this case, as in others,⁵⁷ the attempt to apply EU law *outside* the territories of the EU Member States cannot be considered unlawful. Rather, the proposed amendment should be classified as a territorial extension of EU law, as the application of EU competition rules to pipelines coming to and from third countries is triggered by the fact that they end in the territory of a Member State.⁵⁸ As stated by the ECJ in ATAA, 'the European Union legislature may in principle choose to permit a commercial activity (...) to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the (...) objectives which it has set for itself'.⁵⁹ These measures 'incorporate an extraterritorial element through making market access conditional, directly or indirectly, on conduct of foreign operators or suppliers occurring abroad'.⁶⁰ Their effect is 'to impose an extra cost on foreign producers'.⁶¹ The Commission proposal can be considered to be in line with the aforementioned case law. In the following section, we will explain the reasons why the Council opposed the proposed extension of the territorial scope of the new Directive.

⁵³ The EU Aviation Emission Trading Scheme is one example and the EU Regulation instituting the system to prevent, deter and eliminate illegal, unreported, and unregulated fishing is another.

⁵⁴ J. Scott, *supra* note 52, 106-107.

⁵⁵ *Ibid.*

⁵⁶ UNCLOS Opinion, *infra* note 62, para. 4.

⁵⁷ The most well-known is the case of the EU emission trading system, assessed by the ECJ in ATAA, *supra* note 4. See J. Scott, 'The New EU Extraterritoriality', 51 *Common Market Law Review* 2014, at 1344.

⁵⁸ J. Scott, *supra* note 52. See, also, Advocate General Kokott's Opinion in Case C-366/10 (6 October 2011), 150-155 and ECJ, Case C-286/90, *Poulsen and Diva Navigation*, [1992] ECLI:EU:C:1992:453, 30-34.

⁵⁹ Case ATAA, *supra* note 4, para. 128.

⁶⁰ N. Dobson, 'Extraterritorial Climate Protection Under International Law: A Jurisdictional Analysis of EU Unilateralism' (PhD thesis, Utrecht University 2018), chapter 2.3, at 62.

⁶¹ *Ibid.*

5. THE CHALLENGE OF THE *RATIONE LOCI* SCOPE OF THE PROPOSED AMENDMENT BY THE COUNCIL

The Council Legal Service issued two opinions on the Commission's proposal to amend the 2009 GMD. The most important one for the purpose of this paper concerns the compatibility of the proposed changes with UNCLOS.⁶² The basic premise was that the EU is entitled to rule on matters over which the Member States have sovereignty or jurisdiction under international law, *including in maritime areas*, as established by case law.⁶³ However, for the Council, the application of Union energy law to the EEZ breached UNCLOS, which is binding for both the Union and its members.⁶⁴

First of all, the legal service of the Council stated: '[e]xtending the scope of the Gas Directive to the EEZ of the Member States would result in treating an offshore pipeline passing through the EEZ of a Member State like a pipeline crossing its territory, even if the transmission line is not connected to its national transmission system.'⁶⁵ This is the case with NS2, as the pipeline *passes* through several EEZ (Finland, Sweden, Denmark and Germany) but *ends* in a single Member State (Germany). The Council's words can be interpreted as supporting the view that the proposed extension of the *ratione loci* scope is contrary to the principle of territoriality. However, the Council failed to identify the fundamental reason for the extension: the connection of the pipeline to one of the Member States would justify the extension of competition rules to the EEZ of all Member States.

As to the conflict with UNCLOS, the point was made that under this Convention – as interpreted by the ECJ – the coastal state's sovereignty over the EEZ is functionally limited and strictly tied to the exploration and exploitation activities defined by the Convention.⁶⁶ This is also recognised by scholars.⁶⁷ In addition, the coastal state's sovereign rights in the EEZ must coexist with other countries'

⁶² Council of the European Union, Opinion of the Legal Service, Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC – Compatibility with UNCLOS (6738/8, 1 March 2018) 2017/0284 (COD) 2 (hereafter, *UNCLOS Opinion*), pdf available at <<https://data.consilium.europa.eu/doc/document/ST-6738-2018-INIT/en/pdf>>.

⁶³ ECJ, Case C-405/92, *Établissements Armand Mondiet SA v Armement Islais SARL*, [1993] ECLI:EU:C:1993:906, para. 12, available at <<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61992CJ0405>>; UNCLOS Opinion, *supra* note 62, para. 8.

⁶⁴ The Union is a contracting party to UNCLOS and its provisions thus form an integral part of the Union legal order and are binding upon the institutions and upon the Member States. See Articles 3(5), second sentence and 216(2) TFEU.

⁶⁵ UNCLOS Opinion, *supra* note 62, para. 5.

⁶⁶ *Ibid.*, para. 21; ECJ, Case C-111/05, *Aktiebolaget NN v Skatteverket*, [2007] ECLI:EU:C:2007:195, para. 59, available at <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62005CJ0111>> and ECJ, Case C-347/10, *A. Saleminck v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, [2012] ECLI:EU:C:2012:17, para. 35, available at <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0347>>.

⁶⁷ In its EEZ '[t]he coastal state does not have full sovereignty as on its land or in its territorial sea but a right of jurisdiction that is related to certain purposes.' See C. A. Fleischer, 'The Exclusive Economic Zone under the Convention Regime and in State Practice', in *The 1982 Convention on the Law of the Sea, Proceedings of the Seventeenth Annual Conference* (July 12-16, 1983); C. Quince, *The Exclusive Economic Zone* (Delaware: Vernon Press 2019), at 36.

freedoms, including the right to lay submarine pipelines.⁶⁸ The Council acknowledged that under Article 58(3) UNCLOS those freedoms can only be exercised in compliance with the laws and regulations adopted by the coastal state following the provisions of UNCLOS or public international law.⁶⁹ However, the coastal state can only take reasonable measures that regulate the laying of the pipelines and are connected to its right to exploit natural resources or prevent pollution from pipelines (Articles 56(1) and 79(2) UNCLOS). By contrast, coastal states (and, as a result, the Union) cannot apply their respective legislations to the EEZ for other purposes, for example, to protect security of supply.⁷⁰ The provisions of the 2009 GMD regulating competition in the internal market of natural gas can also not be applied to this area, as they are unrelated to the economic exploitation of the resources present in the EEZ.⁷¹ This means that, in the absence of a direct connection with any of the subject matter listed in Article 56(1) UNCLOS, the proposed GMD was considered to be incompatible with Part V of this Convention.⁷² Accordingly, if the EU had extended the scope of the GMD to the EEZ of the Member States, it would have been acting in breach of EU and Member States' obligations under the Law of the Sea Convention.

The legal implications of the Commission's proposal on the allocation of competences between the Union and the Member States were addressed in a second opinion of the Council Legal Service.⁷³ The point was made that the proposed expansion of the *ratione loci* scope of the 2009 GMD would have major consequences: under Article 3(2) TFEU, the adoption of internal rules in the field of the gas market would trigger the Union's exclusive competence to conclude agreements regulating the operation of third country pipelines.⁷⁴ In parallel, Member States would lose their external powers to conclude such agreements and would be obliged to eliminate any incompatibilities between the existing intergovernmental agreements with third countries and the Gas Directive.⁷⁵

We will now examine the Council's position. The Council never referred to the (alleged) extraterritorial application of EU law as being the main reason

⁶⁸ See Art. 58(1) and 79, UNCLOS.

⁶⁹ UNCLOS Opinion, *supra* note 62, 16-17.

⁷⁰ Art. 79(4), UNCLOS; see also ECJ, Case C-266/13, *L. Kik v Staatssecretaris van Financiën (Kik)*, [2015] ECLI:EU:C:2015:188, para. 41, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0266>>.

⁷¹ By contrast, there is Union legislation in force which applies to the EEZ and the continental shelf of the Member States, such as Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations.

⁷² UNCLOS Opinion, *supra* note 62, para. 17.

⁷³ Council of the European Union, Opinion of the Legal Service, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – legal basis, allocation of competences, derogations (7502/18, 26 March 2018), 2017/0294 (COD) (hereafter: Allocation of competences opinion), filed with the author.

⁷⁴ Allocation of competences opinion, para. 19.

⁷⁵ *Ibid.*, 23-25.

behind its opposition to the Commission's proposal to extend the application of the energy *acquis* to offshore pipelines coming from third countries lying in the EEZ of coastal states. However, the opinion of the Legal Service is ambiguous in this respect. For the Council, the incompatibility with international law was based both on the absence of a connection to onshore landing (for states that are not 'entry points') and on the fact that, according to UNCLOS, Member States' jurisdiction is limited in their EEZ. As already seen, the Commission convincingly argued that a pipeline's onshore landing in a Member State would trigger Union jurisdiction to adopt legislation on its offshore sections lying in the EEZ of its members, despite the limited jurisdiction of coastal states in this maritime zone, particularly as this would be in line with the position adopted by the ECJ in *ATAA* (see section 4).⁷⁶ In other words, from an international law perspective, the EU can rely on the territoriality principle in this case, as the decisive element is the adequate link with the country or international organisation concerned.⁷⁷

The Council's position seems to have been inspired more by the fear that Member States would lose their competence to conclude agreements with third countries than by genuine concerns that the application of EU secondary law would breach the territoriality principle and/or the UNCLOS provisions related to the EEZ. Thus, the Council's restrictive view taken on the *ratione loci* scope of the EU Energy Directive seems to be linked to the need to safeguard Member States' exclusive external powers.

As we will see in the next section, in the final text of the 2019 GMD the Commission's proposal was changed: in the approved version, the reference to the EEZ was removed. Nevertheless, the effects of the new piece of legislation on the activity of foreign operators such as Gazprom should not be underestimated.

6. THE REDUCED *RATIONE LOCI* SCOPE OF THE NEW DIRECTIVE AND THE EFFECTS OF THE NEW LEGAL REGIME ON THIRD COUNTRY OPERATORS

On 15 April 2019, the Council backed the controversial revision of the 2009 GMD. However, according to the final text, EU legislation applies only to the sections of the pipeline that lie in the *territorial sea* of the Member State where the first interconnection point is located.⁷⁸ As a result, the 2019 GMD applies to pipelines to and from third countries but not to their sections lying in the EEZ, as proposed by the Commission. As will be shown, the amendment will, in any case, entail effects outside the territory of the EU Member States. It remains to be seen whether, despite the reduced *ratione loci* scope of the 2019 GMD, the

⁷⁶ Case *ATAA*, *supra* note 4, para. 128.

⁷⁷ See Advocate General Kokott's Opinion in *ATAA*, paras. 149 onwards.

⁷⁸ Article 1(1) 2019 GMD. See, also, K. Yafimava, 'Gas Directive Amendment: Implications for Nord Stream 2', *The Oxford Institute for Energy Studies, Energy Insight* 49 (March 2019).

Union can impose respect of certain competition principles on foreign operators such as Gazprom.

Given that a pipeline is an uninterrupted conduit, the application of EU competition law to just one portion of it does not seem to make any legal sense. Seemingly, undertakings that own and operate external pipelines will have to adapt to EU internal market rules. In fact, it is very likely that third country operators will still have to comply with the requirements of the 2019 GMD, as the ownership unbundling model imposes on operators the choice between *producing* natural gas and *supplying* pipeline transport services. In other words, foreign operators may be required partially to alter their organisational and business structure so as to be able to continue importing gas into the EU. This would fundamentally weaken the basis for providing funding for that infrastructure. In addition, they could be obliged to publish the methodology used to establish the terms and conditions for accessing their capacity and may be asked by the relevant Member States' regulatory authorities to publish their tariff methodology.⁷⁹

The 2019 GMD grants *existing* infrastructures the opportunity to obtain a derogation⁸⁰ from their obligations. As for *new* infrastructures (pipelines *not yet completed* at the time of its entry into force), these may obtain an exemption under its Article 36. This may be a way for non-EU companies temporarily to avoid complying with European rules.⁸¹ However, in order to obtain the afore-said exemption, a number of conditions would have to be met, particularly after the 2019 GMD has entered into force. One of the most important requirements is that the investment must *enhance* competition in gas supply and security of supply⁸² and the exemption must also now not be detrimental to: firstly, competition in the relevant markets *which are likely to be affected* by the investment; secondly, the effective functioning of the internal market in natural gas; thirdly, the efficient functioning of the regulated systems concerned; or, lastly, *security of supply* of natural gas in the Union.⁸³ Furthermore – and this is a major innovation – the national authority competent for granting the exemption is obliged to consult the national regulatory authority of the other Member States 'the markets of which are likely to be affected by the new infrastructure'⁸⁴ and the relevant authorities of the third countries connected with the Union through the pipeline.⁸⁵

⁷⁹ Art. 9(1) and 32(1) 2009 GMD; see K. Yafimava (*ibid.*) for an analysis of the ways of ensuring the compliance of (the German section of) NS2 with the amended Directive. See, also, K. Talus, M. Wüstenberg, 'Risks for the Geographical Scope of EU Energy Law', 26(5) *European Energy and Environmental Law Review* 2017, at 141; the authors argue that operators located in third countries 'at the other end of [a] pipeline' importing gas into the EU may be affected.

⁸⁰ See new Art. 49a, Art. 1(9) 2019 GMD.

⁸¹ Obtaining a certification by the national regulatory authorities under Article 9 GMD is another possibility, but it would still require companies such as Gazprom to make certain ownership/operatorship changes; see K. Yafimava, *supra* note 79.

⁸² Art. 36(1)(a) and (8)(e) 2009 GMD.

⁸³ New Art. 36(1)(e), Art. 1(5)(a) 2019 GMD.

⁸⁴ New Art. 36(3)(a), Art. 1(5)(b), 2019 GMD.

⁸⁵ New Art. 36(3)(b), *ibid.* See section VII for further comments on the role of the Commission in the exemption procedure.

In the past, Article 36 was used to grant an exemption to the *OPAL* pipeline (one of *Nord Stream 1*'s onshore extensions). However, the Commission's decision to exempt the pipeline was successfully challenged by Poland before the General Court (GC) in the *OPAL* case,⁸⁶ thus contributing to it being made more difficult for new pipelines to obtain exemptions from some of the Gas Directive obligations. This ruling was based on the principle of energy solidarity, which is an expression of a general principle of law. The GC considered the latter a parameter for the legitimacy of the Commission's decision. In particular, the judges held that energy solidarity translates into an obligation for EU institutions and Member States 'to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.'⁸⁷ As stated, it will no longer be possible for Member States to develop energy infrastructures while ignoring the energy interests of other EU members.⁸⁸

The *OPAL* ruling has far-reaching implications for the application of the 2019 GMD. It is likely that the criteria of Article 36 – particularly the criterion according to which the exemption must not be detrimental to competition in the relevant markets that are likely to be affected by the investment – will be interpreted in light of the aforementioned decision.⁸⁹ The lesson that can be learnt from this ruling is that by requiring the Commission to balance the impact of its decision on Polish, German and EU energy security, the GC is contributing to the coordination of energy policies.⁹⁰ The question is whether the current division of competences between the Union and its members – providing the latter with important retained powers in the energy field – is satisfactory, considering that decisions such as those concerning the building of NS2 affect the position of other Member States, as is clear from the *OPAL* ruling. In light of this consideration, the Commission's enhanced overseeing role will be assessed in the following section.

7. THE COMMISSION'S OVERSEEING ROLE AS A GUARANTEE OF THE UNION'S ENERGY SECURITY

The 2009 GMD amendment reinforced the set of mechanisms established by the EU to guarantee respect of internal gas market principles and the security

⁸⁶ ECJ, Case T-883/16, *Poland v Commission (OPAL)*, [2019] ECLI:EU:T:2019:567, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016TJ0883>>.

⁸⁷ *ibid.*, para. 77; see, also, paras. 69 and 78; T. M. Moschetta, 'La solidarietà interstatale nella politica energetica dell'Unione europea: note a margine della sentenza del Tribunale Polonia c. Commissione', *I I Post di AISDUE* 2019, 'Note e commenti' no. 12 (31 December 2019), available at <aisdue.eu>.

⁸⁸ A. Riley, 'The "Principle of Solidarity": OPAL, Nord Stream, and the Shadow over Gazprom', *Atlantic Council* (17 October 2019), available at <<https://www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/>>.

⁸⁹ See Advocate General Bordona's Opinion, Case C 848/19 P (18 March 2021), *Federal Republic of Germany v Republic of Poland, European Commission*, para. 37.

⁹⁰ A. Boute, 'The Principle of Solidarity and the Geopolitics of Energy: Poland v Commission (OPAL pipeline)', 57 *Common Market Law Review* 2020, at 890.

of supply. While for derogations for existing infrastructures⁹¹ the Commission acts merely as an ‘observer’ in the consultation between the Member State in whose territory the first connection point is located and the third country,⁹² under Article 36 it enjoys the power to withdraw or impose amendments to requests for exemptions.⁹³ The relevant regulatory authority must comply with the Commission decision.⁹⁴

Since the 2019 GMD widened the scope of application of the 2009 GMD, the Commission’s power of veto is now extended to exemptions to (new) inter-connectors distributing gas between a Member State and a third country while, prior to the amendment, only the pipelines connecting Member States were entitled to apply for exemptions from some of its provisions. In addition, the criteria to be fulfilled in order to obtain an exemption have been modified, and the possible detrimental effects to other Member States’ energy markets now have to be taken into account. As a result, it is more difficult to obtain an exemption (see section 6).

The 2019 GMD also had effects on the Commission’s power to influence Member States’ decisions in the energy field. In this particular case – presumably due to the Council’s concerns – Member States retained their competence to conclude international agreements regulating the operation of import pipelines, but a centralised control mechanism was established (so-called ‘empowerment procedure’).⁹⁵ Under the 2019 GMD, if a Member State intends to enter into negotiations with a third country to amend or conclude an agreement on the operation of a pipeline concerning matters falling within the scope of the Directive, it must notify the Commission of its intention. Therefore, the new legal regime empowers the Commission to *refuse* a Member State authorisation to start negotiations for an agreement that *may affect* Union common rules. More precisely, the EU institution will not authorise the opening of negotiations if the prospective agreement is in conflict with, *inter alia*, Union law or is detrimental to the functioning of the internal market in natural gas, competition or security of supply.⁹⁶

The Commission’s overseeing role in this policy field must be seen in light of the significant interconnection (and consequent interdependence) of the Member States’ energy markets. It is no coincidence that the EU competence in these matters must be exercised ‘in a spirit of solidarity between Member States’⁹⁷ and that ‘in order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity’.⁹⁸ As already demonstrated (see section 6), the *OPAL* judgment heightens the importance of energy solidarity.

⁹¹ See new Art. 49a, Art. 1(9) 2019 GMD, and section 6.

⁹² New Art. 49a(2), second sentence.

⁹³ Article 36(9) 2009 GMD; L. Hancher, A. Marhold, *supra* note 43.

⁹⁴ Article 36(9) 2009 GMD.

⁹⁵ New Art. 49b, Art. 1(9) 2019 GMD.

⁹⁶ *Ibid.*, para. 3.

⁹⁷ Art. 194(1) TFEU. Besides, in all cases of shared competence, the Member States and the Union have a mutual duty to cooperate sincerely with each other (Art. 4(3), TEU).

⁹⁸ Art. 6 2009 GMD.

Article 194(2) second paragraph TFEU grants a Member State the right to determine its choice between different energy sources and to preserve the general structure of its energy supply. However, decisions such as those concerning the building of NS2 may significantly affect the position of other Member States.⁹⁹ Moreover, since the gas market is highly dependent on infrastructures – to the extent that, without them, it would neither function nor exist¹⁰⁰ – it is essential to guarantee the correct application of competition principles. Even though the EU and its members share competences in the areas of the internal market and energy,¹⁰¹ the exclusive competence for establishing competition rules necessary for the functioning of the internal market lies with the EU.¹⁰² As suggested by Talus, ‘energy forms part of the pursuit of creating a functioning internal market’.¹⁰³ This is also clear from the wording of Article 194 TFEU, which states that the Union policy on energy will aim, *inter alia*, to ensure the functioning of the energy market. Other important objectives are to ensure the security of energy supply in the Union and to promote the interconnection of energy networks.

It is debatable whether it is still appropriate for Member States to retain part of their sovereignty in the energy field, or whether it would be more appropriate to transfer greater control to European level in this area, in order to align national policies and to safeguard the interests of all – also in light of the cited principle of energy solidarity. The Commission’s communication of 16 October 2014 on the short-term resilience of the European gas system analysed the effects of a partial or complete disruption of gas supplies from Russia and concluded that *purely national approaches* would not be very effective in the event of severe disruption, given their scope, which is, by definition, limited.¹⁰⁴ When examining the proposal to amend the 2009 GMD, the European Economic and Social Committee advanced the possibility that some Member States may see the amendments as limiting their sovereignty to some degree.¹⁰⁵ Nevertheless, it clarified that the Commission was seeking to create conditions for *significant* intervention, where necessary and at an *agreed EU policy level*, which could restrict the creation of further dependency on Russian gas and thus stimulate

⁹⁹ While Central and Eastern European countries previously enjoyed greater energy security, from the time the new pipeline is operational, Russia will be free to cut off or reduce energy supplies to these regions without leaving Western countries short of gas. One such scenario sees Central and Eastern Europe countries subject to the risk of energy shocks, as well as poor diversification of supply and higher prices than in the Western market. See A. Riley, *supra* note 14, 9-10.

¹⁰⁰ Furthermore, the European gas market is dominated by a few large national companies, which control and share the market. A vertically integrated structure, characterised by long-term supply contracts, is also conducive to abuse and anti-competitive practices.

¹⁰¹ Art. 4(2)(a) and (i) TFEU.

¹⁰² Art. 3 TFEU.

¹⁰³ K. Talus, ‘Introduction to EU Energy Law’, *Oxford University Press Scholarship Online* (November 2016), at 12.

¹⁰⁴ Recital (5) EU Reg. 2017/1938 of the European Parliament and of the Council of 25 October 2017 [2017] OJ L 280/1 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010.

¹⁰⁵ Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC [2018] OJ C 262/64, para. 4.4.

diversity of supply. As correctly stated, this is an objective which will further the best interests of the EU.¹⁰⁶

8. CONCLUDING REMARKS

In this paper we have seen how the Commission unsuccessfully attempted to extend the territorial scope of EU sector-based legislation on the internal market of gas to pipelines connecting a third country and a Member State. It did so through two legal paths. Initially, the Commission sought to obtain a mandate from the Council to negotiate an EU-Russia agreement that would require compliance with the EU *acquis*. The international agreement would have regulated the operation of pipelines, including their offshore sections, thus being applicable extraterritorially, that is, in the EEZ of some Member States. Secondly, it proposed to amend the 2009 GMD and make it applicable to the portion of the pipelines importing gas from third countries to the EU lying in the territory, territorial sea and EEZ of the Member States. The latter would have amounted to a territorial extension of EU law based on the territorial link of a pipeline terminating in a Member State's territory. As a result, it would have been compliant with international law. The final text of the 2019 GMD does not contain any reference to the EEZ as the Council considered that amendment to be contrary to certain provisions of the Law of the Sea regulating the jurisdiction of states in their EEZ (which is functionally limited to specific activities by UNCLOS). In the meantime, the Council's main intention appeared to be to avoid the pre-emption effect and to safeguard Member States' power to conclude agreements with third countries concerning the operation of external pipelines.

Notwithstanding its reduced scope compared to its original proposed form, the 2019 GMD is expected to have significant effects on third country operators, which will probably need to make some adjustments in order to import gas into the EU. Until then, the EU could extend the global reach of its energy law through the adoption of bilateral or multilateral international law instruments externalising the European *acquis*, such as the Treaty establishing the Energy Community.¹⁰⁷ With the adoption of the 2019 GMD, the EU has gone further: the new GMD, despite being *de jure* applicable in the 'Union territory', is *de facto* capable of producing effects that will affect third country operators. The need to extend the reach of EU law beyond its members' territories in the 'Gas Directive' saga is due to the concern that dependence on Russian gas may affect EU energy security. As far as the writer is aware, this is the first time that the territorial extension of EU law has been proposed for the purpose of safeguarding the Union's energy security.

As recently emphasised by the High Representative J. Borrell (HR), the Commission has acknowledged that the completion of NS2 does not lead to the diversification of the EU's energy sources, this being one of the objectives of

¹⁰⁶ Ibid., para. 4.7.

¹⁰⁷ See, in particular, Title II on the Extension of the Acquis Communautaire, available at <<https://www.energy-community.org/legal/treaty.html>>.

the Energy Union.¹⁰⁸ Nonetheless, as has been seen, the Union is powerless when it comes to Member States' decisions on their different energy sources and the general structure of their energy supply. As stated by the HR, what the EU can do is 'to require that [NS2] will be working in a non-discriminatory and in a transparent way with an adequate degree of regulatory oversight, in line with the key principles of International and European Union Energy law'.¹⁰⁹ The pipe-laying has been interrupted several times due to US secondary sanctions against companies involved in the project. In response to this move, the EU condemned the US sanctions as being contrary to international law.¹¹⁰ The pipeline should be inaugurated by the end of 2021, but new tensions between the EU and Russia, confirmed by the HR's declarations,¹¹¹ could lead to a further delay and, in the worst-case scenario, the abandonment of the project. With a recent deal between Germany and the US, Germany emphasises that 'it will abide by both the letter and the spirit of the Third Energy Package with respect to Nord Stream 2 under German jurisdiction'.¹¹²

In view of the above, the Commission's aim can be considered to be achieved, at least with regard to NS2. Instead of using the connection with the Union as a trigger for the territorial extension of EU competition principles through the pipeline, respect of the *acquis communautaire* will, in any case, be guaranteed. As a consequence, foreign operators such as Gazprom may be forced to align with some European internal market rules.

¹⁰⁸ EEAS Press Release, 'Russia: Speech by High Representative/Vice-President Josep Borrell at the EP Debate' (Brussels, 29 April 2021), available at <https://eeas.europa.eu/headquarters/headquarters-homepage/97446/russia-speech-high-representativevice-president-josep-borrell-ep-debate_en>.

¹⁰⁹ Ibid.

¹¹⁰ EEAS Press release, 'Statement by the High Representative/Vice-President Josep Borrell on US Sanctions' (Brussels, 17 July 2020), available at <https://eeas.europa.eu/headquarters/headquarters-homepage/83105/statement-high-representativevice-president-josep-borrell-us-sanctions_en>.

¹¹¹ EEAS Press Release, *supra* note 107.

¹¹² US Department of State, Joint Statement of the United States and Germany on Support for Ukraine, European Energy Security, and our Climate Goals, 21 July 2021, available at <https://www.state.gov/joint-statement-of-the-united-states-and-germany-on-support-for-ukraine-european-energy-security-and-our-climate-goals/?utm_source=POLITICO.EU&utm_campaign=862f7081b6-EMAIL_CAMPAIGN_2021_07_21_08_44&utm_medium=email&utm_term=0_10959edeb5-862f7081b6-190589839>.

GLOBAL REACH OF EU LAW IN FINANCIAL LEGISLATION

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1. INTRODUCTION

The European Union (EU) constructed a supranational legal and decision-making system in which the EU Member States cede some of their powers to EU institutions.¹ Consequently, the main target recipients of EU law are the Member States. However, in some cases, EU law stretches to other territories beyond EU borders, expanding its scope of application to third countries (non-EU countries).² This is better known as the global reach of EU law.³ A clear example is competition law. Another case where EU law has had a global reach is in the regulation of financial services.⁴ This effect can arise as a consequence of an EU equivalence decision.⁵ In such decisions, the EU evaluates whether the regulatory and supervisory framework of a third country is equivalent to EU rules on the same topic.⁶

This paper will discuss circumstances in which equivalence decisions in EU law have had global reach despite this not being originally intended. The global reach of EU law is used as an 'umbrella term' in this paper because it includes different elements of application of EU law beyond its borders, such as, territorial extension, and their consequence: the 'Brussels Effect'.⁷

On the other hand, equivalence decisions emerge as a requirement established in the legal framework of financial services in the EU.⁸ As non-EU members, third countries' participants require specific authorisations to access the EU financial markets and to act as market players.⁹ These authorisations

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¹ M. Schonard, 'Supranational Decision-Making Procedures', European Parliament, Fact Sheets on the European Union (2021), available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/8/supranational-decision-making-procedures>>.

² L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules', 9 *Journal of European Competition Law & Practice* 2018, 487-495, at 487.

³ J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders, the Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press 2019), 21-63, at 63.

⁴ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *The American Journal of Comparative Law* 2014, 87-126, at 94.

⁵ *Ibid.*

⁶ European Commission, 'Equivalence of Non-EU Financial Frameworks', available at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en>.

⁷ For more details see *infra* section 2, at 4.

⁸ See European Commission, *supra* note 6.

⁹ E. Wymeersch, 'Third-Country Equivalence and Access to the EU Financial Markets including in case of Brexit', 4 *Journal of Financial Regulation* 2018, 209-275, at 210.

can take the form of an equivalence decision. In some cases, if this decision considers the legal systems not to be equivalent, the third country's participant may not access the EU single market.¹⁰ Therefore, one of the options available to the third country is to modify its legislation and to adopt new laws having similar effects to the corresponding legislation in the EU.¹¹ Hence, the author seeks to demonstrate how the denial or repeal of an equivalence decision leads to the global reach of EU law in third countries as the EU must evaluate third countries' legislation and conduct, with this constituting territorial extension as defined by J. Scott.¹² As a consequence, a third country may ultimately develop legislation based on EU law. For instance, an equivalence decision taken in 2012 which had deemed equivalent the regulation and supervision of the Australian Credit Rating Agencies (CRAs) was repealed in 2019 by the European Commission.¹³ Furthermore, before obtaining equivalence, the Australian Securities and Investment Commission (ASIC) had already developed a guide on some Australian financial services based on the standards of the International Organization of Securities Commissions (IOSCO) and the European Securities and Markets Authority (ESMA).¹⁴ The equivalence decision was repealed as, in 2013, the EU updated its legal framework of CRAs through Regulation (EU) No. 462/2013, adding new requirements to EU registered agencies, and the Australian authorities did not update their legislation to include these new requirements or to have similar effects.¹⁵ Hence, the European Commission, on advice from the ESMA, concluded that the Australian supervisory and regulatory regime on CRAs did not fulfil the equivalence conditions.¹⁶ Therefore, if the Australian authorities wanted to re-establish such equivalence, they would have to modify or add new legal provisions based on Regulation (EU) No. 462/2013. For this reason, this paper will argue that equivalence decisions have contributed to the global reach of EU law in financial legislation through territorial extension.

¹⁰ European Commission, 'Commission Staff Working Document. EU Equivalence Decisions in Financial Services Policy: An Assessment', 27 February 2017, SWD(2017) 102 final, at 9, available at: <https://ec.europa.eu/info/sites/default/files/eu-equivalence-decisions-assessment-27022017_en.pdf>.

¹¹ Ibid.

¹² See J. Scott, *supra* note 3.

¹³ Commission Implementing Decision (EU) 2019/1276 of 29 July 2019 repealing Commission Implementing Decision 2012/627/EU on the recognition of the legal and supervisory framework of Australia as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies, OJ [2019] L 201/17, 30.7.2019.

¹⁴ Australian Securities and Investment Commission (ASIC), 'Credit rating agencies – guidance on certain AFS licence conditions', Guidance on certain AFS licence conditions (2011), available at: <<https://asic.gov.au/regulatory-resources/financial-services/credit-rating-agencies/credit-rating-agencies-guidance-on-certain-afs-licence-conditions/>>.

¹⁵ Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ [2013] L 146/1, 31.5.2013.

¹⁶ European Commission, 'Commission sets out its equivalence policy with non-EU countries and presents its recent EU equivalence decisions', Press Release (29 July 2019), available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4309>.

For these purposes, equivalence decisions will be referred to as positive decisions when the third country's supervisory and regulatory regime is deemed equivalent, and negative decisions when these systems are not deemed equivalent or when a decision that had previously approved the equivalence is repealed by the EU. Moreover, the author will point out the different effects in third countries, dividing these into three categories. The first will refer to the EU's neighbouring third countries. The second will focus on effects in third countries which are not located near EU borders but have significant financial markets, and the third will refer to distant third countries without large financial markets, which have a lesser impact.

This paper is structured as follows: it commences with Section 2 which illustrates the global reach of EU law and the elements involved in this notion. In Section 3 the concept of equivalence decisions in EU law is introduced. Section 4 then analyses how secondary law uses this instrument and its different features in four financial services. As such, Section 4 is divided into four subsections. Thereafter, the major problems associated with equivalence decisions are presented in Section 5 and their effects are analysed in Section 6. In Section 7, this paper puts forward a proposal to solve those issues. Finally, a conclusion is reached.

2. THE GLOBAL REACH OF EU LAW AND ITS CORE ELEMENTS

This section investigates the concept of the global reach of EU law and the elements it involves, namely, extraterritoriality, territorial extension and a phenomenon that appears as a consequence: the 'Brussels Effect'. It will also explain how equivalence decisions are related to territorial extension and not to extraterritoriality.

The global reach of EU law operates through measures implemented by the EU and its Member States.¹⁷ For example, suggestions to third countries on the implementation of certain rules or demands for the fulfilment of EU law.¹⁸ Such measures can have extraterritoriality or territorial extension.

The notion of extraterritoriality in international law derives from the concept of jurisdiction.¹⁹ However, extraterritoriality has also been used to describe any measures with effects beyond domestic borders. Nevertheless, new concepts have emerged to differentiate these measures' impact, i.e., territorial extension. Territorial extension is a term introduced by J. Scott to establish a better understanding of the global reach of EU law.²⁰ As defined by J. Scott, 'territorial

¹⁷ C. Kuner, 'The Internet and the Global Reach of EU Law', in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press 2019), 112-145, at 113.

¹⁸ Ibid.

¹⁹ R. Dover and J. Frosini, 'The Extraterritorial Effects of Legislation and Policies in the EU and US', European Parliament-Policy Department DG External Policies Study (16 May 2012), at 7, available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET\(2012\)433701_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET(2012)433701_EN.pdf)>.

²⁰ See J. Scott, *supra* note 4.

extension' occurs when an action is generated through territorial connection but requires, in order to assess compliance with that action, the evaluation of a foreign conduct and/or legislation.²¹

In the case in question, equivalence decisions do not have an extraterritorial effect because a measure is extraterritorial only if it assigns a duty to a person who has no territorial connection with the regulating state.²² However, some EU law provisions concerning financial services do have extraterritorial effects. For these reasons, the concept of extraterritoriality is also necessary to understand the global reach of EU law. In any event, since this paper focuses on equivalence decisions, it will refer exclusively to territorial extension as a mechanism of the global reach of EU law and to the 'Brussels Effect' as a consequence of this mechanism.

The territorial extension of a measure is an instrument which allows the EU to have control over certain events that occur outside EU territory and, to exert an influence over international and third countries' law.²³ In recent years, EU law has exerted influence beyond the EU borders in areas such as data protection law and, more recently, securities law. The first example occurred due to the fact that Regulation (EU) 2016/679 (General Data Protection Regulation, hereafter GDPR) can be applied to non-EU data controllers and operators.²⁴ In securities law, Regulation (EU) No 648/2012 (European Market Infrastructure Regulation, hereafter EMIR) introduced clearing obligations for entities in third countries acting in cross-border transactions.²⁵ These are examples of the global reach of EU law by way of territorial extension.²⁶

Hence, the EU's global regulatory power has expanded and the concept of the reach of EU law has evolved.²⁷ In this regard, M. Cremona explains that the extension of the reach of EU law may be possible as a result of the EU's external mission envisaged by Art. 3(5) of the Treaty on the European Union (TEU).²⁸ Consequently, the EU uses these external relations powers through

²¹ See J. Scott, *supra* note 3.

²² *Ibid.*; J. Scott, 'The New Extraterritoriality', 51 *Common Market Law Review* 2014, 1343-1380, at 1344.

²³ See J. Scott, *supra* note 4.

²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ [2016] L 119/1, 4.5.2016; European Data Protection Board, 'Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)', Guidelines, (2020), available at: <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf>.

²⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ [2012] L 201/1, 27.7.2012; European Securities and Markets Authority (ESMA), 'Clearing obligation and risk mitigation techniques under EMIR', Policy activities, available at: <<https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation>>.

²⁶ See J. Scott, *supra* note 3; M. Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press 2019), 64-111, at 105.

²⁷ See M. Cremona, *supra* note 26.

²⁸ *Ibid.*; Art. 3(5) of Treaty on the European Union (TEU): '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests...' Consolidated version of

different elements, such as trade, development and the internal market, to expand the reach of EU law.²⁹ However, this has also provoked some criticism. For instance, the EU has been referred to as contributing to 'unilateral regulatory globalisation', better known as the 'Brussels Effect'.³⁰ This phenomenon occurs through territorial extension as a result of the EU's institutional structure which, together with a strong internal market, has increased the EU's influence as a global standards setter.³¹ A. Bradford explains the *de jure* 'Brussels effect' as the intentional or unintentional use of instruments which transfer EU legislation to third countries' law.³² Indeed, this applies to the subject of this paper as market access through equivalence decisions extends the reach of EU law to third countries' legislation in financial services through territorial extension.

Consequently, the global reach of EU law in financial legislation as proposed in this paper will expose some issues concerning clarity towards third countries which may have an undesired effect with regard to the harmonisation of international financial law. This situation arises because in some cases – for instance, in equivalence decisions – the global reach of EU law is not yet identified and has not been addressed by the European Court of Justice, not even as a spill-over effect of EU law into third countries' financial legislation. Furthermore, the legal framework establishing how these decisions are taken and how these procedures work is not standardised. Additionally, there is no possibility of appealing a negative equivalence decision, while a positive equivalence decision can be revoked at any time at very short notice.³³ Therefore, a clearer set of rules, such as a unique legislative act defining equivalence decisions, could contribute to achieving the EU's objectives and have a positive impact through the global reach of EU law.

3. EQUIVALENCE DECISIONS IN EU LAW

An equivalence decision is a unilateral assessment carried out by the EU on third countries' regulatory, supervisory, and enforcement regimes concerning certain services by which it decides whether those regimes are comparable to EU standards.³⁴

These decisions can be applied in different fields. If the regimes are deemed equivalent by the European Commission, the third country's participants are temporarily or indefinitely authorised to operate, partially or fully, in the internal

the Treaty on European Union – Title I: Common Provisions – Article 3 (formerly Article 2 TEU) OJ [2008] C 115/17, 9,5,2008.

²⁹ Ibid.

³⁰ See J. Scott, *supra* note 4; A. Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press 2020), at 67.

³¹ See A. Bradford, *supra* note 30.

³² See A. Bradford, *supra* note 30, at 3.

³³ S. Morrison, 'International Company and Commercial Law Review Third-Country Equivalence: A Brexit Scenario for UK Financial Services', 29 *International Company and Commercial Law Review* 2018, at 4.

³⁴ See E. Wymeersch, *supra* note 9.

market.³⁵ These decisions take the legal form of an implemented or delegated act signed by the institution in charge of executing this task.³⁶ There are two different systems for making an equivalence decision depending on the institution in charge.³⁷ In the first method, the decision is taken by the European Commission and its conclusion acts as a source for certain authorisations or approvals.³⁸ In some of these procedures, the European Commission has support from a European Supervisory Authority (ESA). In the second method, on the other hand, an ESA, namely, the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) or the European Insurance and Occupational Pensions Authority (EIOPA),³⁹ has full control of the decision-making process and its conclusion concerns a specific subject.⁴⁰

For instance, the ESMA has been an ESA in charge of some of these procedures due to its supervisory and decision-making functions.⁴¹ Moreover, it supervises Credit Rating Agencies (CRAs) and Trade Repositories (TRs).⁴²

Such acts determine three aspects: whether the equivalence is full or partial, whether the decision grants equivalence for an unlimited or limited period, and whether these decisions deem a third country's supervisory framework to be equivalent entirely or in relation to just some supervisory authorities.⁴³ Therefore, if the European Commission deems a third country's regulation not to be equivalent, access to the EU market is denied. Equivalence decisions can be used as a strategic instrument as they can be repealed if a later analysis finds that the conditions under which permission was granted have changed.⁴⁴ The European Commission then informs the party involved, expressly requesting changes in order to re-establish the initial circumstances.⁴⁵ If the third country

³⁵ See European Commission, *supra* note 10, at 5.

³⁶ A. C. Duville-Margerit, B. Mesnard and M. Magnus, 'Third Country Equivalence in EU Banking Legislation. European Parliament. Briefing', European Parliament-Economic Governance Support Unit DG Internal Policies Briefing (12 July 2017), at 4, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI\(2016\)587369_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf)>.

³⁷ See E. Wymeersch, *supra* note 9, at 217.

³⁸ *Ibid.*, at 218.

³⁹ Art. 33 common to Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ [2010] L 331/12, 15.12.2010; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ [2010] L 331/48, 15.12.2010; and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ [2010] L 331/84, 15.12.2010.

⁴⁰ See E. Wymeersch, *supra* note 9, at 218.

⁴¹ European Securities and Markets Authority (ESMA), 'Equivalence', Policy activities, available at: <<https://www.esma.europa.eu/policy-activities/benchmarks/equivalence>>.

⁴² European Securities and Markets Authority (ESMA), 'Supervision', Policy activities, available at <<https://www.esma.europa.eu/supervision/supervision>>.

⁴³ See European Commission, *supra* note 6.

⁴⁴ See A. C. Duville-Margerit, B. Mesnard and M. Magnus, *supra* note 36, at 2.

⁴⁵ *Ibid.*

fails to act accordingly, the equivalence decision will be revoked.⁴⁶ For these reasons, some equivalence decisions can be considered temporary and controversial.

However, there is no single set of rules concerning equivalence decisions. EU secondary law has expressly mentioned the cases in which equivalence decisions take place through different regulations and directives. Furthermore, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (2003) (hereafter Prospectus Directive) was the first to mention equivalence in this area.⁴⁷ The Prospectus Directive did not establish an equivalence clause referring to equivalence decisions. However, it did mention that a supervisory authority in a third country '(...) ensures the equivalence of prospectuses drawn up in that country with this Directive.'⁴⁸ Moreover, one of the Prospectus Directive's objectives was 'to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.'⁴⁹ Hence, investor protection was one of the main objectives of equivalence decisions from then on.

On the other hand, one of the few official documents to have elaborated on equivalence decisions in financial services is a Communication from the Commission issued in 2019.⁵⁰ In this document, the European Commission explained that the EU is protecting its single market and its individuals (e.g. potential investors in third countries) by controlling the regulation that would apply in the event of an infringement.⁵¹ Additionally, it stated that due to the high-risk nature of some financial services, the EU uses equivalence to safeguard financial stability in the Euro area by examining whether a third country's supervision measures are equivalent to actions taken in the EU.⁵²

That function is particularly important for the EU as these decisions are used as a way of controlling the lack of supervision of financial services performed by third countries which may ultimately endanger financial stability.⁵³ However, S. Maijor, who was the Chair of the ESMA, in January 2016 expressed his concern about the need to improve equivalence decisions in this area.⁵⁴ In his

⁴⁶ Ibid.

⁴⁷ European Parliament and European Council, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC 2003, OJ [2003] L 345/64, 31.12.2003.

⁴⁸ Ibid., Art. 20(3).

⁴⁹ Ibid, Recital 10.

⁵⁰ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Equivalence in the area of financial services' (29 July 2019), COM(2019) 349 final, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0349>>.

⁵¹ Ibid.

⁵² Ibid.

⁵³ N. Moloney, 'Reflections on the EU Third Country Regime for Capital Markets in the Shadow of Brexit', 17 *European Company and Financial Law Review* 2020, at 37.

⁵⁴ S. Maijor, keynote speech, PRIME Finance 6th Annual Conference (23 Jun 2016), at 9, available at <https://www.esma.europa.eu/sites/default/files/library/esma71-844457584-329_prime_finance_conference_-_keynote_address_by_steven_maijor.pdf>

speech, he invited ambitious revisions to be made to the EMIR on account of the danger that may be caused by a lack of supervision of third country participants, considering that third countries' infrastructures and market participants were registered individually and not *en bloc*, making it very difficult for the ESMA and the EU institutions in charge of supervision to evaluate the safety of their networks.⁵⁵

Another objective of equivalence decisions is to apply just one set of rules to financial services provided by third countries.⁵⁶ A positive equivalence decision in certain financial services enables a third country's supervision and regulation regimes to be applied.⁵⁷ Prior to these decisions, the relationship between the EU and a third country with regard to which law applied to regulation, supervision, and enforcement in the event of a financial services infringement was much more complicated, as there was no clear distinction. Hence, the financial sector in the EU has largely benefited from equivalence decisions.

As of 10 February 2021, the European Commission has made over 250 equivalence decisions.⁵⁸ This list has not been updated.

When the Commission Communication was released in 2019, V. Dombrovskis, then Vice-President for Euro and Social Dialogue, also in charge of Financial Stability, Financial Services, and the Capital Markets Union, stated that equivalence decisions were intended to protect financial stability and at the same time to encourage international integration of EU financial markets.⁵⁹ Moreover, in 2017, the European Commission released a Staff Working Document in which it explained the other purposes of equivalence decisions. That document mentioned four main objectives: financial stability, investor protection, promotion of regulatory convergence around international standards, and establishment or upgrading of supervisory cooperation.⁶⁰ Hence, there is no clear legal framework for making equivalence decisions because each official document, regulation or directive including an equivalence clause has a different text and gives equivalence decisions a different objective. There is a lack of a common approach to assess such decisions. Therefore, it can sometimes be difficult to establish the exact purpose of each equivalence decision. However, due to the aforementioned circumstances, it could be said that financial stability is their most important objective. Other objectives, such as financial integration, disappeared in an equivalence decision concerning Swiss stocks markets, which will be discussed later, as Switzerland implemented a retaliation measure.⁶¹

⁵⁵ Ibid.

⁵⁶ See European Commission, *supra* note 16.

⁵⁷ See European Commission, *supra* note 50, at 8.

⁵⁸ European Commission, 'Overview table – equivalence/adequacy decisions taken by the European Commission' (10 February 2021), available at: <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/overview-table-equivalence-decisions_en.pdf>. There is no official information on how many equivalence decisions have been made to date. The last report is dated 10 February 2021.

⁵⁹ See European Commission, *supra* note 16.

⁶⁰ See European Commission, *supra* note 10, at 5.

⁶¹ J. J. Deslandes, C. Dias and M. Magnus, 'Third country equivalence in EU banking and financial regulation', European Parliament, Think Tank (27 August 2019), at 3,

4. THE MECHANICS OF EQUIVALENCE DECISIONS IN FINANCIAL SERVICES

Financial services regulation in the EU has been constantly adapted to adjust to new challenges and to preserve financial stability.⁶² The EU has used secondary law to regulate some of these services. On account of the crisis between 2008 and 2010, financial stability plays a major role. Consequently, the EU launched the following sets of rules: the Regulation on CRAs in 2009, the Directive on Alternative Investment Fund Managers (AIFMs) in 2011, and the EMIR, and the revision of the Markets in Financial Instruments Directive (MiFID II) in 2012. This legal framework is of particular significance to this paper as it included equivalence decisions and became a basis for a then novel regulatory view concerning a third country regime on financial services.⁶³ Another significant aspect of this new legal framework was that some of these rules eliminated previous requirements entailing third country companies having a presence in the EU in order to access EU markets.⁶⁴ The following paragraphs will analyse some instruments and parts of this financial services legal framework.

4.1. Credit Rating Agencies (CRAs)

CRAs have been ruled by a regulatory oversight regime through a regulation and a directive. This legal framework determined that CRAs established in a third country have their ratings admitted in the EU and these can be applied for regulatory purposes within the EU.⁶⁵

This is possible through two systems. The first is a certification given by the ESMA which can be requested directly by the agency involved.⁶⁶ However, the ESMA can only issue this document subject to a cooperation arrangement with the authority in charge of that matter in the third country.⁶⁷ The second method is known as endorsement. In this system, third country-based agencies observe some legal conditions which must be equally as stringent as EU requirements.⁶⁸ The ESMA is also responsible for this procedure. This authority establishes a

available at: <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA%282018%29614495>; See State Secretariat for International Finance (SIF), *infra* note 93.

⁶² M. Andenas and I. H. Chiu, 'Financial Stability and Legal Integration in Financial Regulation', 38 *European Law Review* 2013, 335-359, at 336.

⁶³ L. Quaglia, 'The Politics of "Third Country Equivalence" in Post-Crisis Financial Services Regulation in the European Union', 38 *West European Politics* 2015, at 167.

⁶⁴ See N. Moloney, *supra* note 53.

⁶⁵ European Commission, 'Regulating Credit Rating Agencies', available at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/managing-risks-banks-and-financial-institutions/regulating-credit-rating-agencies_en>.

⁶⁶ G. Deipenbrock, 'Direct Supervisory Powers of the European Securities and Markets Authority (ESMA) in the Realm of Credit Rating Agencies-Some Critical Observations in a Broader Context', 29 *European Business Law Review* 2018, 169-203, at 195.

⁶⁷ See European Commission, *supra* note 65.

⁶⁸ *Ibid.*

list of third countries which have regulations as stringent as the EU rules.⁶⁹ These two systems illustrate how EU law can have a global reach as a result of the list released by the ESMA.

4.2. Alternative Investment Fund Managers (AIFMs)

This financial instrument was regulated in 2011 through a directive. At the time, it had two main purposes: to protect investors and to reduce systemic risk.⁷⁰ Fund managers operating in the EU but established in third countries are also covered by this directive.⁷¹ However, in this case, the equivalence decision works differently from the previous instrument, as these fund managers must comply with the Alternative Investment Fund Managers Directive in order to be granted a passport to access the EU market.⁷²

4.3. European Market Infrastructure Regulation (EMIR)

This regulation was created as a response to Over the Counter (OTC) derivatives which failed during the 2008 crisis.⁷³ Equivalence decisions were also implemented as an instrument in this regulation to recognise Central Clearing Counterparties (CCPs) and TRs based in third countries.⁷⁴ These equivalence decisions are adopted by the European Commission or the ESMA and their function is to confirm that third countries' legal and supervisory regimes concerning CCPs or TRs are equivalent to the EU legal framework.⁷⁵ The CCPs or TRs can apply directly to obtain this recognition. Once it is granted, third countries' CCPs and TRs can be used by EU market participants to clear OTC derivatives or report transactions.⁷⁶

4.4. Markets in Financial Instruments Directive II (MiFID II) / Markets in Financial Instruments Regulation (MiFIR)

These sets of rules began in 2004 with the Markets in Financial Instruments Directive I (MiFID I) which sought investor protection and improved performance

⁶⁹ European Securities and Markets Authorities (ESMA), CRA Authorisation (7 May 2021), available at: <<https://www.esma.europa.eu/supervision/credit-rating-agencies/risk>>.

⁷⁰ European Commission, 'Directive on Alternative Investment Fund Managers ('AIFMD'): Frequently Asked Questions', available at: <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_10_572>.

⁷¹ R. Zepeda, 'To EU or Not to EU: That is the AIFMD Question', 9 *Journal of International Banking Law and Regulation* 2014, 82-102, at 98.

⁷² European Commission, 'Directive on Alternative Investment Fund Managers ('AIFMD'): Frequently Asked Questions', *supra* note 75.

⁷³ European Commission, 'Derivatives/EMIR', available at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/derivatives-emir_en>.

⁷⁴ European Commission, 'Derivatives/EMIR', *supra* note 52.

⁷⁵ S. James and L. Quaglia, 'Brexit and the Political Economy of Euro-Denominated Clearing', 28 *Review of International Political Economy* 2021, 505-527, at 522.

⁷⁶ European Commission, 'Derivatives / EMIR', *supra* note 52.

of the financial markets in the EU.⁷⁷ However, that directive fell short and was improved by implementing the MiFID II and the MiFIR at the same time in 2018. MiFID II is of particular importance due to the fact that if a third country's exchange does not have an equivalence decision, it cannot offer EU investors access to liquid assets as they acquired non-EU equities.⁷⁸ It forces EU investors to trade in EU platforms despite having their entire trading activity in a third country.⁷⁹ Another interesting aspect of MiFID II is that in this directive some equivalence decisions are granted by the European Commission to third countries and not to companies, as in previous cases.

Consequently, equivalence decisions have several approaches, purposes, and methods for being granted. This is another reason why equivalence decisions require a more uniform legal framework in order to avoid confusion and to use the power held by these decisions to foster integration in the financial markets and to contribute to converging international financial law.

5. EQUIVALENCE DECISIONS IN FINANCIAL SERVICES: A MATTER OF CONTROVERSY

These decisions have been controversial as they are made unilaterally and the set of rules regulating the process gives discretion to the European Commission and ultimately to ESAs to alter the outcome.⁸⁰ Moreover, these decisions cannot be appealed when a third country's regulation and supervision are deemed not to be equivalent to the EU system.⁸¹ However, in EU law, the third country regime has been characterised by a deference principle.⁸² Therefore, this approach is to be expected. Furthermore, the EU created its internal market and therefore has the autonomy to legislate as it sees fit.

Additionally, the EU can use internal market access as a conditionality tool.⁸³ Conditionality, in this case, is an instrument used to produce policy modifications or to demand policies that a third country would not otherwise introduce.⁸⁴ This is the case of a Deep and Comprehensive Free Trade Area (DCFTA) which is part of an Association Agreement (AA) between the EU and Ukraine and was

⁷⁷ S. Pitz and H. Nemeczek, 'Brexit, MiFIR and MiFID II: Third-Country Firms Providing Cross-Border Investment Services-An Overview of the Relevant Organisational and Business Conduct Requirements', 32 *European Business Law Review* 2021, 53-76, at 55.

⁷⁸ R. Horzempa, 'MiFID II and the Importance of Equivalence Decisions', 37 *Review of Banking and Financial Law* 2018, at 604.

⁷⁹ *Ibid*, at 605.

⁸⁰ See E. Wymeersch, *supra* note 9.

⁸¹ E. Howell, 'An Analysis of the Prospectus Regime: The EU Reforms and the "Brexit Factor"', 15 *European Company and Financial Law Review* 2018, 69-100, at 94.

⁸² See N. Moloney, *supra* note 53.

⁸³ I. Borchert *et al.*, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy', *World Trade Review* 2021, 1-25, at 9.

⁸⁴ O. Morrissey, 'Alternatives to Conditionality in Policy-Based Lending', in S. Koeberle *et al.* (eds.), *Conditionality Revisited: Concepts, Experiences, and Lessons Learned* (Washington DC: World Bank 2005), 237-247, at 237.

signed in 2014 explicitly based on market access conditionality.⁸⁵ It is a key concept for understanding the global reach of EU law as, in some cases, it responds to conditionality and not to provisions with territorial extension. On the other hand, market access conditionality appeared as a legally binding mechanism in the DCFTA between the EU and Ukraine.⁸⁶ Therefore, it could be argued that this special type of conditionality does not apply to other third countries. For example, it does not apply to the aforementioned Australian case as the Australian authorities did not have any agreement with the EU on the subject of the equivalence decision which required conditionality. Nevertheless, the decision was repealed because the Australian authorities did not modify or introduce new legislation.⁸⁷

Moreover, these decisions can turn political due to the aforementioned discretionary power to decide.⁸⁸ Hence, there is a very fine line between the EU's use of equivalence decisions to maintain its financial stability and their use to apply political power in negotiations with third countries. Another example of this controversy is the case of the refusal to extend an equivalence decision concerning Swiss stock exchanges in 2019.⁸⁹ The EU had recognised the equivalence of the Swiss financial regulation on stock exchanges, as required by MiFID II.⁹⁰ In December 2018 it was extended for six months until June 2019.⁹¹ Nevertheless, it expired and was not further extended.⁹² In this case, the European Commission considered previous Council conclusions of 28 February 2017 in which the establishment of a common institutional framework regarding the participation of Switzerland in the EU internal market was a precondition for further development in the EU-Switzerland sectoral approach.⁹³

This decision has been debated as Switzerland has a strong legal framework on financial services which is designed to be compatible with EU legal stan-

⁸⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2014] L 161/3, 29.05.2014; G. Van der Loo, *The DCFTA: Market Access Conditionality and Mechanisms to Ensure the Uniform Interpretation and Application of the EU Acquis* (Leiden: Brill/Nijhoff 2016), at 210.

⁸⁶ *Ibid.*, at 208.

⁸⁷ European Commission, 'Australia', Trade (2021), available at: <<https://ec.europa.eu/trade/policy/countries-and-regions/countries/australia/>>.

⁸⁸ See E. Wymeersch, *supra* note 9.

⁸⁹ M. Baltensperger, 'The Consequences of Switzerland's Lost Equivalence Status', *Bruegel* (25 July 2019), available at: <<https://www.bruegel.org/2019/07/the-consequences-of-switzerland-lost-equivalence-status/>>.

⁹⁰ European Commission, 'Commission proposes to extend equivalence for Swiss share trading venues for six months', press release (17 December 2018), available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6801>.

⁹¹ Commission Implementing Decision (EU) 2018/2047 of 20 December 2018 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, OJ [2014] L 327/77, 21.12.2018.

⁹² State Secretariat for International Finance (SIF), 'Measure to protect Swiss stock exchange infrastructure', Swiss Confederation, Financial Market Policy and Strategy (4 February 2021), available at: <<https://www.sif.admin.ch/ordinance>>.

⁹³ See M. Baltensperger, *supra* note 89.

dards.⁹⁴ In fact, over recent years, various equivalence decisions had recognised Swiss legislation in financial matters.⁹⁵ Nevertheless, in this case, the equivalence decision was clearly used politically as the European Commission not only evaluated the applicable supervisory, regulatory and enforcement regime of Swiss stock exchanges (which falls into the realm of EU territorial extension, as defined earlier) but also used the granting of equivalence as a condition for Switzerland to enter the market and for the EU to obtain the updated institutional framework agreement.⁹⁶ The denial of extension of this equivalence decision had the exact opposite effect of achieving financial integration and stability as it not only denied access to the EU market but also entirely removed the possibility of an institutional framework agreement between the EU and Switzerland.⁹⁷ In addition, Switzerland now prevents Swiss investment firms from trading Swiss companies' shares in EU trading venues.⁹⁸ Switzerland's measures in response to the loss of equivalence are contributing to what is considered financial disintegration.⁹⁹

Any decision concerning financial services provided by a third country in the EU is of greater importance these days, following Brexit, due to the role played by British financial services for the United Kingdom and the EU.¹⁰⁰ In 2020, the EU and the UK failed to reach any agreement on financial services.¹⁰¹ Hence, as of 2021, UK financial services providers must apply for an equivalence decision in order to provide services to the EU market and vice versa, as passporting between the UK and the EU ended on 31 December 2020.¹⁰² Furthermore, equivalence decisions do not have the same impact as passporting as they concern only a specific service, while passporting covers a large number of

⁹⁴ State Secretariat for International Finance (SIF), 'European Union', Swiss Confederation, Bilateral Relations (24 September 2020) available at: <<https://www.sif.admin.ch/sif/en/home/bilateral/lander/europaeische-union-eu.html>>.

⁹⁵ See European Commission, *supra* note 58.

⁹⁶ State Secretariat for International Finance (SIF), *supra* note 92.

⁹⁷ Swiss Confederation, 'Institutional Agreement', Switzerland European Policy (18 June 2021), available at: <<https://www.eda.admin.ch/europa/en/home/verhandlungen-offene-themen/verhandlungen/institutionelles-abkommen.html>>.

⁹⁸ See State Secretariat for International Finance (SIF), *supra* note 92; Verordnung über die Anerkennung ausländischer Handelsplätze für den Handel mit Beteiligungspapieren von Gesellschaften mit Sitz in der Schweiz [Ordinance on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland], SR 958.2, 30.11.2018; Federal Department of Finance (FDF), 'Based on the Ordinance dated 30 November 2018 on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland, the FDF publishes the present list', Swiss Confederation (20 December 2018), available at <<https://www.news.admin.ch/news/message/attachments/55256.pdf>>.

⁹⁹ D. Pesendorfer, *Financial Markets (Dis)Integration in a Post-Brexit EU: Towards a More Resilient Financial System in Europe* (Cham: Palgrave Macmillan 2020), at 170.

¹⁰⁰ D. Howarth and L. Quaglia, 'Brexit and the Single European Financial Market', 55 *Journal of Common Market Studies* 2017, 149-164, at 152.

¹⁰¹ Institute for Government, UK-EU Future Relationship: Financial Services, Explainers (16 August 2021), available at: <<https://www.instituteforgovernment.org.uk/explainers/future-relationship-financial-services>>.

¹⁰² *Ibid.*; Scottish Government, Financial Services and the EU (Banking and Regulation), Brexit, (16 February 2021), available at: <<https://www.mygov.scot/financial-services-eu/>>.

services.¹⁰³ For some authors, it can also be seen as a tool for relocating to the EU the clearing services that were originally positioned in the UK; this would – yet again – transform this decision into a political and strategic one.¹⁰⁴ However, in March 2021, the UK and the EU drafted a Memorandum of Understanding (MoU) to establish a framework for the regulation of financial services.¹⁰⁵ This document has not yet been signed. Therefore, equivalence remains a viable option. Another concern is the fact that several firms have transferred from the UK to an EU country.¹⁰⁶ Therefore, there might be a conflict of interest for the EU.¹⁰⁷

Another example that can be used to illustrate the withdrawal of an equivalence decision is the case of several decisions concerning CRAs which have been cancelled.¹⁰⁸ This is a very important example in identifying the territorial extension of equivalence decisions and in understanding how the treatment differs depending on the third country in question.

These equivalence decisions were taken in 2019 and concerned third country credit rating agencies offering services in the EU, namely Australia (aforementioned case), Brazil, Singapore, Canada, and Argentina.¹⁰⁹ The European Commission sent communications in advance, noting that the legal framework of CRAs had changed in the EU through a 2013 amendment and stating that the recipients' corresponding regulations should, therefore, comply with this

¹⁰³ See A. C. Duvallet-Margerit, B. Mesnard and M. Magnus, *supra* note 36, at 2.

¹⁰⁴ See N. Moloney, *supra* note 53.

¹⁰⁵ A. Nardelli and I. Wishart, 'U.K. and EU Reach First Post-Brexit Deal on Financial Rules' *Bloomberg* (26 March 2021), available at <<https://www.bloomberg.com/news/articles/2021-03-26/u-k-and-eu-reach-post-brexit-agreement-on-financial-regulation>>.

¹⁰⁶ See Institute for Government, *supra* note 101.

¹⁰⁷ See N. Moloney, *supra* note 53; See S. James and L. Quaglia, *supra* note 75; M. Kalaitzake, 'Brexit for Finance? Structural Interdependence as a Source of Financial Political Power within UK-EU Withdrawal Negotiations', 28 *Review of International Political Economy* 2021, 479-504, at 480.

¹⁰⁸ See European Commission, *supra* note 16.

¹⁰⁹ *Ibid.*; Commission Implementing Decision (EU) 2019/1276 of 29 July 2019 repealing Commission Implementing Decision 2012/627/EU on the recognition of the legal and supervisory framework of Australia as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies, *OJ* [2019] L 201/17, 30.7.2019; Commission Implementing Decision (EU) 2019/1277 of 29 July 2019 repealing Implementing Decision 2012/630/EU on the recognition of the legal and supervisory framework of Canada as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies C/2019/5801, *OJ* [2019] L 201/20, 30.7.2019; Commission Implementing Decision (EU) 2019/1278 of 29 July 2019 repealing Implementing Decision 2014/248/EU on the recognition of the legal and supervisory framework of Singapore as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies C/2019/5802, *OJ* [2019] L 201/23, 30.7.2019; Commission Implementing Decision (EU) 2019/1281 of 29 July 2019 repealing Implementing Decision 2014/245/EU on the recognition of the legal and supervisory framework of Brazil as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies C/2019/5805, *OJ* [2019] L 201/34, 30.7.2019; Commission Implementing Decision (EU) 2019/1282 of 29 July 2019 repealing Implementing Decision 2014/246/EU on the recognition of the legal and supervisory framework of Argentina as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies C/2019/5806, *OJ* [2019] L 201/37, 30.7.2019.

reform.¹¹⁰ Hence, the alternative was to modify internal legislation to create new laws having the same effects as those of the EU. For this reason, this is a case of territorial extension of EU law. Several years passed and these changes were never made. As a consequence, the European Commission cancelled the previous recognition it had given to those financial services providers.¹¹¹ By contrast, some equivalence decisions between the EU and third countries, such as the United States of America (USA), have been granted without a time limit.¹¹²

These actions could demonstrate how the global reach of EU law can fall into different categories depending on the third country involved. The first category refers to European third countries. This category may include Switzerland, as the aforementioned European third country in which an equivalence decision concerning stock exchanges was not extended. The UK can also be included in this category as it is a European third country having strong trade relations with the EU. As these countries are neighbouring states, they may be subject to regional agreements and conditionality which may not always meet the aforementioned concept of territorial extension of EU law. However, equivalence decisions in these cases could be related to the *de jure* 'Brussels Effect' as explained by A. Bradford because a third country is enacting legislation based on EU law.¹¹³

The second category refers to non-European third countries. For example, this may include the USA, which is a third country but is located very far from EU borders and conducts trade relations with the EU.¹¹⁴ However, these relations are not as interdependent as the relations between the EU and Switzerland or the UK.¹¹⁵ On the other hand, the USA has always had a very advanced financial market and its status as a developed and independent third country may significantly determine the reach of EU law in this territory.¹¹⁶ This is significant as the USA is unlikely to modify its financial services legislation. Indeed, this country has actually exported legislation in that field and is recognised by the extraterritorial effect of its law on financial services.¹¹⁷

There is a third category concerning third countries with financial markets that have a lower impact in the EU. This category includes the examples given earlier: Argentina, Australia, Brazil, Canada, and Singapore, in which CRA

¹¹⁰ See European Commission, *supra* note 16.

¹¹¹ *Ibid.*

¹¹² Commission Implementing Decision (EU) 2019/1279 of 29 July 2019 on the recognition of the legal and supervisory framework of the United States of America as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies C/2019/5803, OJ [2019] L 201/26, 30.7.2019; See, also, R. Horzempa, *supra* note 83.

¹¹³ See Bradford, *supra* note 31.

¹¹⁴ P. Delimatsis, 'The Evolution of the EU External Trade Policy in Services-CETA, TTIP, and TiSA after Brexit', 20 *Journal of International Economic Law* 2017, 583-625, at 584.

¹¹⁵ R. Schwok, 'Switzerland-EU Relations: The Bilateral Way in a Fragilized Position', 25 *European Foreign Affairs Review* 2020, 159-176, at 160.

¹¹⁶ F. Pennesi, 'Equivalence in the Area of Financial Services: an Effective Instrument to Protect EU Financial Stability in Global Capital Markets?', 58 *Common Market Law Review* 2021, 39-70, at 54.

¹¹⁷ A. Laby, 'The Extraterritorial Application of U.S. Financial Services Regulation', 2 *Swiss Review of Business Law* 2017, 1-9, at 2.

equivalence was withdrawn as they failed to modify their internal legislation. For a concrete example, the Monetary Authority of Singapore (MAS) has stated that it is working on keeping its financial legislation 'at the European level'.¹¹⁸ In this regard, F. Pennesi and J. Okonjo have previously highlighted the fact that EU law can have a different impact depending on the size, relevance and location of the third country's financial markets.¹¹⁹

6. EFFECTS OF EQUIVALENCE DECISIONS

Equivalence decisions can have different effects depending on their content. If the decision is positive, it has an impact on financial stability and financial markets integration not only at EU level but also globally. If the decision is negative or if it is repealed by the EU, it may lead to a modification of the third country's regulatory, supervisory, or enforcement system in order to match EU standards. This is not necessarily a negative aspect. However, it may be considered an imposition. Therefore, it is a clear example of the territorial extension of EU law contributing to its global reach. This is because the regulation of a non-EU country must be altered in order to be similar to or have the same effects as the one applied in the EU. Hence, laws on financial services in two different territories would be homogeneous and the standard would be set by the EU. For this reason, the requirements of equivalence decisions for a third country represent territorial extension of EU law and also illustrate, as a consequence, the so-called *de jure* 'Brussels effect'.

This territorial extension of EU law should be considered in the equivalence decision-making process and also in the law-making procedure (with regard to financial services legislation that includes an equivalence provision) in the EU as it could facilitate the much needed integration of financial markets and harmonisation of international financial law. However, at present, equivalence decisions are taken with no regard to how their outcome may influence third countries' financial markets by introducing modifications to internal legislation. This is because the legal provision for a financial service in the EU may or may not be the same in a third country because of its market's characteristics and needs. In addition, the lack of a clear legal framework for making these decisions

¹¹⁸ Monetary Authority of Singapore (MAS), "The Future of Finance is Green" – Transcript of Fireside Chat with Mr Ravi Menon, Managing Director, Monetary Authority of Singapore, and Mr Mark Carney, Secretary-General's Special Envoy for Climate Action and Finance, United Nations, moderated by Dr James Crabtree, Associate Professor in Practice, Lee Kuan Yew School of Public Policy, National University of Singapore at the Singapore FinTech Festival on 9 December 2020', Speeches (9 December 2020), available at: <<https://www.mas.gov.sg/news/speeches/2020/the-future-of-finance-is-green>>; Monetary Authority of Singapore (MAS), 'Reply to Parliamentary Question on the European Commission's decision to repeal the equivalence status for Singapore credit rating agencies', Parliamentary replies for parliament sitting (2 September 2019), available at: <<https://www.mas.gov.sg/news/parliamentary-replies/2019/reply-to-parliamentary-question-on-the-european-commissions-decision-to-repeal>>.

¹¹⁹ See F. Pennesi, *supra* note 116; J. Okonjo, 'Assessing the Impact of the Extraterritorial Provisions of the European Markets Infrastructure Regulation (EMIR) on Emerging Economies' OTC Derivatives Markets: A Doctrine of Proportionality Perspective Challenges and Unresolved Issues', 7 *The Indian Journal of International Economic Law* 2015, 1-51, at 8.

gives rise to uncertainty among third countries interested in the EU financial markets.¹²⁰ Moreover, the political use of these equivalence procedures in relation to the UK and Switzerland generates mistrust among third countries in the genuine goals of these mechanisms. This may be detrimental to the aim of achieving international convergence in financial matters, this being one of the intentions of these decisions, as, instead of achieving harmonisation, possible disagreement may lead to power struggles in the financial sector between countries.¹²¹ This does not mean that the EU should lose its autonomy to decide or should automatically admit any third country interested in its market. The main objective to be achieved is clarity: if a third country knows how the decision will be made, that country will trust the system and may alter its legislation to ensure that access is granted.

7. PROPOSAL TO TACKLE ISSUES OF EQUIVALENCE DECISIONS

In this regard, some academics have put forward some suggestions. For instance, N. Moloney proposes a tiered system of jurisdictions at international level taking account of equivalence and supervisory functions.¹²² This could certainly be a useful instrument but it would entail the creation of a whole new system, which may be tricky to implement. F. Pennesi illustrates two possible solutions to the issues of equivalence decisions by proposing to replace the current equivalence mechanism with a system of substituted compliance, as employed in the USA.¹²³ In this system, foreign financial services providers are obliged to register with national authorities and must follow the law of that country.¹²⁴ With regard to this proposal, the author argues that the idea has a different scope than financial stability and financial integration. F. Pennesi also suggests achieving harmonisation between the different equivalence procedures.¹²⁵ The author considers this option to be more achievable and practical. Indeed, this paper proposes something similar by establishing a single rule in the form of a binding legislative act to encompass general procedures on equivalence decisions, or a database. One example of this may be the regulation gathering information on tariffs in the EU, namely, TARIC, the Integrated Tariff of the European Union which is a database of acts concerning EU customs tariff legislation.¹²⁶ A legislative act concerning equivalence decisions could develop the following points: guidelines for interpreting third countries' legislation, institutions in charge, guidelines for deciding, and a defined notice period

¹²⁰ For more details see *supra* section 3, at 10.

¹²¹ See D. Pesendorfer, *supra* note 99, at 364. For more details see *supra* section 5, at 15.

¹²² See D. Pesendorfer, *supra* note 99, at 364.

¹²³ See F. Pennesi, *supra* note 116, at 62.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 64.

¹²⁶ European Commission, 'TARIC, the integrated Tariff of the European Union', Taxation and Customs Union, available at: <https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/customs-tariff/eu-customs-tariff-taric_en>; Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff OJ [1987] L 256/1, 7.9.1987.

in the event of repeals or denials. Currently, some of this information has been integrated into the Communication from the Commission in 2019, mentioned earlier. However, it is not sufficient as it is not binding.¹²⁷ The author believes and has already expressed that equivalence is a good mechanism for achieving the EU's objectives. The current major problem, as stated above, is the lack of clarity of the equivalence regime as it is established in different pieces of legislation, making it difficult to interpret. With a single rule, third countries could easily comply with the system, the EU could accomplish its objectives and the global reach of EU law would have a positive impact.

8. CONCLUSION

The global reach of EU law has increased significantly in recent years, reaffirming the importance of the EU's regulatory power for international law.¹²⁸ However, this broader reach has also implied changes in the EU law's approach to extraterritoriality.¹²⁹ This is because in principle, extraterritoriality was the sole definition applied to any action having effects beyond EU borders. Nevertheless, the global reach of EU law constantly evolves and takes into consideration new elements. Currently, other definitions such as territorial extension are more appropriate to describe the effect of certain measures abroad. For example, that concept applies to suggestions that a third country's legislation should be updated in order to be granted access to a market. This is relevant as, despite not being mandatory, it influences legislation. Hence, these new circumstances should be further analysed and studied to increase the effectiveness of equivalence decisions. In particular, this paper presented these decisions as an action by which EU law is extending its reach to third countries' financial legislation by way of 'territorial extension' as defined by J. Scott.¹³⁰ In this case, the classical definition of extraterritoriality connected to jurisdiction does not apply. However, it has been difficult to categorise these decisions into just one group as there is no common approach to the decision-making process. Hence, in this paper, the author has questioned how these decisions work, how they have an impact not only on a third country's legislation but also on financial integration and convergence in international financial law, and how equivalence decisions can be improved. One of the conclusions reached is that EU institutions can use their global reach in this field to promote convergence and to avoid further fragmentation.

Moreover, equivalence decisions in the EU are a sound instrument for allowing third country participants to have access to the internal market without having a subsidiary in EU territory, to maintain financial stability in the EU and to

¹²⁷ EUR-Lex, 'Atypical acts', Summaries of EU Legislation (10 November 2015), available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0037>>.

¹²⁸ G. Monti, 'The Global Reach of EU Competition Law', in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders, the Extraterritorial Reach of EU Law*, (Oxford: Oxford University Press 2019), at 195.

¹²⁹ See J. Scott, *supra* note 4, at 123.

¹³⁰ See J. Scott, *supra* note 4.

protect the participants on EU financial markets. The legal framework needs to be made clearer and more organised as there is no unequivocal procedure in the current scenario. Moreover, third countries' access to the internal market could be made simpler in order to foster international participation, considering that globalisation and technological developments are making regular cross-border financial transactions much easier. Furthermore, international financial integration will not stop. In fact, it is growing rapidly. Hence, EU institutions in charge of producing and executing laws should also take account of the effect of equivalence decisions, as this has not yet received sufficient attention.

In this way, the EU can truly contribute to international convergence in financial law and integration of financial markets without neglecting financial stability and investor protection. If the aim is to maintain financial stability within the EU, equivalence decisions are a powerful mechanism. However, if the aim is to protect EU investors, maintain financial stability and foster financial integration around the world, then equivalence decisions must be improved. Furthermore, international cooperation is required in order to achieve this goal.

INTERNATIONAL TRANSFERS OF DATA CONCERNING HEALTH AFTER SCHREMS II: A NEED FOR SECTOR-SPECIFIC LEGAL AVENUES AND SUPPLEMENTARY MEASURES

Richard Rak*

1. INTRODUCTION

International (transborder, cross-jurisdictional) transfers of data concerning health may be necessary for a wide range of purposes.¹ The fight against the coronavirus pandemic has highlighted the importance of international data collaborations in developing medicinal products and medical devices. As health data ecosystems expand, an increasing number and variety of stakeholders have become involved in the processing of data concerning health across different jurisdictions.² This expansion is taking place as health data flows are becoming ubiquitous in nature.³ This transformation is driven by the implementation of the Internet of Things (IoT) as an enabling technology in healthcare, which aims to exploit 'network effects' in order to support decisions affecting the

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¹ The main purposes for processing data concerning health in a different jurisdiction are:

- a) provision of patient care;
- b) assessment of health insurance coverage and payment for care provision;
- c) health service management and quality assurance;
- d) public health surveillance and disease control;
- e) public safety management;
- f) population health management;
- g) scientific research (clinical trial); or
- h) market study (See International Organization for Standardization, *ISO/TS 14265:2011(en) Health Informatics – Classification of purposes for processing personal health information*, Annex A).

² Various types of entities may be involved in receiving data concerning health from another jurisdiction, in particular:

- a) healthcare establishments;
- b) public authorities;
- c) health insurance funds;
- d) contractors remotely maintaining health information systems;
- e) researchers (research databanks);
- f) organisations holding educational databases;
- g) companies (e.g. employers, ICT solution providers) holding electronic health datasets; or
- h) organisations engaged in health-related e-commerce (e.g. e-pharmacy) activities (See International Organization for Standardization, *ISO 22857:2013(en) Health informatics – Guidelines on data protection to facilitate trans-border flows of personal health data*, Introduction).

³ C. Kuner, *Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future*, OECD Digital Economy Papers, No. 187 (Paris: OECD Publishing 2011), at 10-11.

health of citizens/patients by delivering the right information to the right person (or machine) at the right time and in the right place.⁴ The rapid scaling of IoT-enabled telehealth solutions during the pandemic has accelerated these developments.⁵ These changes are intensifying the volume and complexities of international transfers of data concerning health, increasing the urgency of improving the underlying legal, technical and organisational arrangements.

In general, growth in cross-jurisdictional data transmissions has led to the adoption of privacy and data protection laws establishing conditions for international transfers of personal data. Globally, there seems to be a growing trend towards stricter requirements, reflected by the inclusion of many General Data Protection Regulation⁶ (GDPR)-like principles in newly adopted or revised legislations outside the EU/EEA.⁷ The protection of personal data and extraterritorial enforcement of privacy and data protection laws have become matters of strategic importance for countries and international alliances. In this regard, the policy goal is to counter risks that may arise from transfers of personal data to a different jurisdiction, notably:⁸

- to prevent the circumvention of domestic or supranational privacy and data protection laws;
- to guard against data processing risks in other jurisdictions;
- to assert privacy and data protection rights in other jurisdictions; and
- to enhance the confidence of individuals.

In order to ensure that two jurisdictions applying two different privacy and data protection laws can act harmoniously, it is fundamental for there to be, in principle, a degree of commonality which is either recognised or achieved.⁹ Although the core principles of privacy and data protection tend to remain fairly consistent from jurisdiction to jurisdiction, when significant differences do appear, privacy and data protection rules may transform into barriers to transborder data flows.¹⁰

⁴ See CISCO Systems, *White Paper: The Internet of Everything (IoE) and the Delivery of Healthcare*, CISCO Systems (2015), available at <<https://www.himss.eu/content/cisco-white-paper-internet-everything-ioe-and-delivery-healthcare>>.

⁵ See O. Bestsenny et al., *Telehealth: A quarter-trillion-dollar post-COVID-19 reality?*, McKinsey & Company (29 May 2020), available at <<https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/telehealth-a-quarter-trillion-dollar-post-covid-19-reality>>.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ [2016] L 119/1, 4.5.2016 (hereafter: General Data Protection Regulation).

⁷ G. Greenleaf, 'Global Data Privacy Laws 2019: 132 National Laws & Many Bills', 157 *Privacy Laws & Business International Report* 2019, 14-18 at 18.

⁸ C. Kuner, *Transborder Data Flow Regulation and Data Privacy Law* (Oxford: Oxford University Press 2013), 107-119.

⁹ World Economic Forum, *A Roadmap for Cross-Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy* (Geneva: World Economic Forum, 9 June 2020), at 23, available at <http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross_Border_Data_Flows_2020.pdf>.

¹⁰ Ibid., at 21.

These rules may act as ‘hard barriers’ if asymmetry exists between legal frameworks (i.e. differences in the legal conditions for transfers of data concerning health, such as the level of protection offered to data concerning health in the respective jurisdictions). Alternatively, they may become ‘soft barriers’ if they establish extra requirements for compliance (e.g. a complex legal procedure for transfers of data concerning health is likely to cause additional administrative and financial burdens for the parties involved).

In this case, legal and practical compliance challenges have posed barriers, which are discouraging transfers of data concerning health from the EU/EEA to third countries. As the Commission has not recognised many of the world’s biggest economies as offering an adequate level of data protection, but it is fair to assume that intensive transborder data flows are taking place, there are doubts about the correct implementation of the respective privacy and data protection rules and the level of compliance in practice.¹¹ Inconsistencies in the authoritative interpretations of the GDPR and the absence of sector-specific guidance on transfers of data concerning health outside the EU/EEA have compounded the legal uncertainty. Such a lack of predictability creates problems not only for data exporters in EU/EEA health data ecosystems, but also for data importers in non-EU/EEA jurisdictions, as well as international organisations, whose work might be hindered.¹² In its landmark ruling in *Schrems II*, the Court of Justice of the European Union (CJEU) made several significant rulings on the proper interpretation and application of the legal framework regulating the requirements for transfers of personal data from the EU/EEA to third countries or international organisations.¹³ The objective of this article is to outline the legal and practical consequences of *Schrems II* and subsequent case law, authoritative legal interpretations and normative acts relating to the establishment of requirements for transfers of data concerning health outside the EU/EEA. Based upon these findings, the article argues that sector-specific legal avenues should be adopted and appropriate supplementary measures should be implemented in order to overcome the barriers that are currently hindering international transfers of data concerning health from the EU/EEA.

¹¹ See C. Kuner, *supra* note 8, at 146; R. H. Weber, ‘Transborder data transfers: concepts, regulatory approaches and new legislative initiatives’, 3 *International Data Privacy Law* 2013, 117-130, at 124.

¹² See J. Stoddart *et al.*, ‘The European Union’s Adequacy Approach to Privacy and International Data Sharing in Health Research’, 44 *The Journal of Law, Medicine & Ethics* 2016, 143-155, at 146.

¹³ Court of Justice of the European Union, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems* [2020], Judgment of the Court (Grand Chamber) of 16 July 2020, ECLI:EU:C:2020:559 (hereafter: *Schrems II Case C-311/18*).

2. LEGAL APPROACHES AND AVENUES FOR TRANSFERRING DATA CONCERNING HEALTH OUTSIDE THE EU/EEA

2.1. Legal approaches for regulating international transfers of personal data

There are two major legislative models that regulate international transfers of personal data (concerning health). It is important to examine them in order to ascertain the underlying policy considerations:¹⁴

- a) The geographical (or jurisdictional) approach¹⁵ aims to protect against risks posed by shortcomings of the legal system in the country or territory to which personal data (concerning health) are to be transferred. This approach is based on a comparative legal assessment of the level of data protection offered by the jurisdictions of the data exporter and the data importer. In order for this evaluation of adequacy or comparability to be amended, a formal review of the comparative legal assessment must be carried out. The drawback of this approach is that since private actions do not have a direct influence on the status of the law, this model does not take account of any special efforts made by the parties concerned.
- b) The organisational (or accountability) approach¹⁶ requires the data exporter to perform its own *ad hoc* assessment and to determine the safeguards needed in order for the transfer to be deemed permissible. This requirement makes organisations accountable for guaranteeing the continuous protection of personal data (concerning health) when those data are transferred to other organisations, irrespective of their geographical location. The appropriate level of safeguards is designed and implemented by the data exporter and data importer either on a contractual basis or through self-regulation or co-regulation. This approach is based on the idea of corporate due diligence.¹⁷ Although there is a 'business case' to promote corporate due diligence and accountability, this model places significant burdens on organisations and enforcement authorities.

¹⁴ See C. Kuner, *supra* note 5, at 20; R. H. Weber, *supra* note 11, at 122; M. Phillips, 'International Data-Sharing Norms: from the OECD to the General Data Protection Regulation (GDPR)', 137 *Human Genetics* 2018, 575-582, at 576.

¹⁵ Regulatory examples include: General Data Protection Regulation (*supra* note 6); Council of Europe, Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data – Consolidated text, ETS No. 223, 128th Session of the Committee of Ministers (Elsinore, 17-18 May 2018).

¹⁶ Regulatory examples include: Organisation for Economic Co-operation and Development, Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013) [C(80)58/FINAL, as amended on 11 July 2013 by C(2013)79]; Asia-Pacific Economic Cooperation (APEC) Privacy Framework (2015) and Cross-Border Privacy Rules (CBPR) System.

¹⁷ C. Bennett and S. Oduro-Marfo, 'GLOBAL Privacy Protection: Adequate Laws, Accountable Organizations and/or Data Localization?', *UbiComp '18: Proceedings of the 2018 ACM International Joint Conference and 2018 International Symposium on Pervasive and Ubiquitous Computing and Wearable Computers* (Singapore, October 2018) (New York: Association for Computing Machinery), 880-890, at 887.

Neither of the two approaches exists in its 'pure' form. Most normative instruments combine these two models in different ways, partly because the geographical approach is losing relevance due to the globalisation of communication channels and data flows.¹⁸ Either of these default approaches can work insofar as they are accompanied by appropriate measures to limit their inherent disadvantages; otherwise, the geographical approach tends to be too reactive, while the organisational approach can become excessively bureaucratic for organisations.¹⁹ Although there is a tendency to proclaim (prescriptive) jurisdiction extraterritorially (referred to as 'regulatory overreaching')²⁰, the reality is that there is no prospect of exercising (adjudicating or enforcing) some jurisdictional claims. This phenomenon is described as 'bark jurisdiction', as opposed to 'bite jurisdiction'.²¹ However, it should be noted that, internationally, the importance of enforceability often lies not in inducing a fear of sanctions in the event of non-compliance but, rather, in affirming a foreign law's legitimacy or political influence.²²

2.2. Legal avenues offered by the GDPR for transferring personal data (concerning health) from the EU/EEA to third countries or international organisations

Chapter V of the GDPR establishes three main legal avenues ('data transfer mechanisms' or 'transfer tools') for transferring personal data from the EU/EEA to third countries or international organisations. These legal avenues also apply to transfers of data concerning health outside the EU/EEA on the condition that the processing of data concerning health is based on a legal ground established in Chapter II of the GDPR. The legal avenues constitute a three-layered hierarchy of rules:

1. 'transfers on the basis of an adequacy decision' by the Commission (Article 45);
2. in the absence of an adequacy decision, 'transfers subject to appropriate safeguards' by the data exporter (controller or processor) on the condition that data subjects' rights can be enforced and effective legal remedies are available for data subjects (Article 46); and
3. in the absence of the foregoing legal avenues, 'derogations for specific situations' may be permitted for which the legislator has decided that the balance of interests allows a data transfer under certain conditions (Article 49).

¹⁸ R. H. Weber, *supra* note 11, at 123.

¹⁹ C. Kuner, *supra* note 5, at 27.

²⁰ L. Bygrave, 'European Data Protection: Determining Applicable Law Pursuant to European Data Protection Legislation', 16 *Computer Law & Security Review* 2000, 252-257, at 255; see, also, General Data Protection Regulation, *supra* note 6, Article 3.

²¹ D. J. B. Svantesson, 'The Extraterritoriality of EU Data Privacy Law – Its Theoretical Justification and Its Practical Effect on U.S. Businesses', 50 *Health Policy and Technology* 2014, 53-102, at 58-59.

²² U. Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (Cambridge: Cambridge University Press 2007), at 205.

In effect, these mechanisms are aimed at ensuring that either the country/jurisdiction (adequacy decision) or the organisation (appropriate safeguards) guarantees an appropriate level of data protection to the data subject.²³ If neither of these requirements is satisfied and there is no situation for permissible derogation, the only way to transfer data concerning health outside the EU/EEA is to render the data anonymous, so that the GDPR no longer applies.

3. SCHREMS II AND ITS IMPLICATIONS ON TRANSFERS OF DATA CONCERNING HEALTH OUTSIDE THE EU/EEA

The *Schrems II* judgment²⁴ was an important milestone in the case law of the CJEU concerning transfers of personal data outside the EU/EEA. The crux of the case was to decide whether the EU-US Privacy Shield adequacy decision and the standard data protection clauses adopted by the Commission guarantee legal protection in light of the fact that US law allows public authorities to access personal data without establishing any limitations on the power it confers to implement surveillance programmes. The CJEU decided to invalidate the EU-US Privacy Shield having found that US law did not offer an 'essentially equivalent' level of protection in providing 'appropriate safeguards', 'enforceable rights' and 'effective legal remedies', as required by the GDPR, read in the light of the Charter of Fundamental Rights of the European Union.²⁵ Nonetheless, the CJEU held that the standard contractual clauses in force for transfers of personal data to processors established in third countries should remain valid, but their application may require the adoption of supplementary measures by the controller in order to ensure compliance with the level of protection required under EU law.²⁶

As regards the consequences of *Schrems II*, the immediate effect is that there is no longer an adequacy decision in force for justifying transfers of data concerning health between the EU and the US. The inability of relying on a predictable mechanism for data transfers has the effect of reducing health data collaborations between the EU and the US (and the rest of the world), which may ultimately lead to the cessation of critical data flows or harmful delays in the same.²⁷ This obstacle has serious legal and economic consequences for a wide range of entities, which would otherwise rely on an effective transfer mechanism between the EU and the US.²⁸ The stakeholders directly affected

²³ L. Bradford *et al.*, 'International transfers of health data between the EU and USA: a sector-specific approach for the USA to ensure an 'adequate' level of protection', *Isaa055 Journal of Law and the Biosciences* 2020, at 6.

²⁴ *Schrems II* (*supra* note 13).

²⁵ *Ibid.*, para. 105.

²⁶ *Ibid.*, para. 133.

²⁷ J. Bovenberg *et al.*, 'How to fix the GDPR's frustration of global biomedical research', 370 *Science* 2020, 40-42, at 41-42.

²⁸ T. Minssen *et al.*, 'The EU-US Privacy Shield Regime for Cross-Border Transfers of Personal Data under the GDPR. What are the legal challenges and how might these affect cloud-based technologies, big data, and AI in the medical sector?', 4 *European Pharmaceutical Law Review* 2020, 34-50, at 46.

include *inter alia* researchers, pharmaceutical companies and organisations involved in providing new health information technologies. The European research-based pharmaceutical industry has expressed its concern that despite the multiple additional safeguards in place for the protection of data concerning health (such as research ethics procedures and Good Clinical Practice frameworks), the requirement to carry out case-by-case adequacy assessments is too burdensome for the industry.²⁹ This heavy burden means that data exporters have to spend significant amounts of supplementary resources on conducting legal assessments necessary to ensure the proper justification of data transfers under Article 46 of the GDPR.³⁰ However, many organisations seeking cross-Atlantic health data collaboration might not possess the resources required to perform these assessments; or, if they do, they then need to perform cost-benefit analyses to ascertain whether or not to allocate these resources for such purposes.³¹

4. THE IMPACT OF *SCHREMS II* ON SUBSEQUENT CASE LAW AND NORMATIVE INTERPRETATIONS RELATING TO THE JUSTIFICATION OF TRANSFERS OF DATA CONCERNING HEALTH OUTSIDE THE EU/EEA

4.1. Recommendations 01/2020 issued by the European Data Protection Board

As a follow-up to *Schrems II*, the European Data Protection Board (EDPB) issued *Recommendations 01/2020* in order to provide a roadmap for controllers and processors (acting as data exporters) to follow a series of steps in adopting appropriate supplementary measures, where necessary.³² Essentially, this roadmap establishes the requirement for data exporters to conduct a ‘transfer impact assessment’.³³ As regards ‘supplementary measures’, they are, by definition, supplementary to the safeguards already envisaged by the Article 46 GDPR transfer tool.³⁴ The EDPB drew on the principle of accountability to call on controllers and processors to demonstrate their data protection efforts to data subjects, the public, and data protection supervisory authorities.³⁵ The EDPB noted

²⁹ B. Barnes, ‘International Transfer of Health Data Cross-Sectoral Roundtable – Summary Report’, *Federation of European Academies of Medicine (FEAM) European Biomedical Policy Forum* (16 October 2020), at 4-5, available at <<https://www.feam.eu/wp-content/uploads/ITHD-Summary-report-5-Nov-2020-FINAL.pdf>>.

³⁰ D. Hallinan *et al.*, ‘International Transfers of Health Research Data following Schrems II: A Problem in need of a Solution’, *European Journal of Human Genetics* 2021, at 4.

³¹ *Ibid.*

³² European Data Protection Board, *Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data* (10 November 2020) (hereafter: EDPB *Recommendations 01/2020*), at 6 (Recital 8) and 8 (para. 6).

³³ European Data Protection Supervisor, *Preliminary Opinion 8/2020 on the European Health Data Space* (17 November 2020), at 12-13 (para. 38).

³⁴ See General Data Protection Regulation (*supra* note 6), Recital 109; *Schrems II* (*supra* note 13), para. 133.

³⁵ EDPB *Recommendations 01/2020* (*supra* note 32), at 7 (para. 3).

that the principle of accountability is necessary in order to ensure effective application of the level of protection conferred by the GDPR, as accountability also applies to data transfers to third countries (and onward transfers), with data transfers being a type of data processing in themselves.³⁶ Drawing on the principle of accountability could facilitate improved responses to new information technology developments and could make EU/EEA data protection rules more interoperable globally.³⁷ In this regard, the EU/EEA should consider that interoperability – not harmonisation or adequacy – is the key objective of the APEC Cross-Border Privacy Rules³⁸ (CBPR), which are generally more appealing from a corporate perspective, as they are less complex and prescriptive to respect and more facilitative of transborder data flows.³⁹

4.2. The ruling of the French Council of State concerning the French Health Data Hub and Microsoft Ireland

Schrems II prompted several legal cases at national level of significance to transfers of data concerning health outside the EU/EEA. Following the CJEU's judgment, the French Council of State (*Conseil d'État*) was asked to rule on the legality of the French Health Data Hub (Hub).⁴⁰ According to the applicants, there was a risk of the right to privacy and the right to protection of personal data being violated in the processing and centralisation of data concerning health in the Hub with regard to the COVID-19 epidemic. Previously, the Hub had concluded a contract with Microsoft Ireland Operations Ltd, a company incorporated under Irish law. Under this contract, Microsoft Ireland licensed software necessary to process data concerning health collected by the Hub, and it stored and made available these data from its data centres located in the Netherlands. The applicants argued that significant legal risks were posed by the fact that Microsoft Ireland was a subsidiary of Microsoft Corporation, a company incorporated under US law and therefore subject to US surveillance laws.

In its judgment, the *Conseil d'État* noted that in *Schrems II* the CJEU only ruled on the conditions under which transfers of personal data to the US may take place, but did not rule on the conditions under which such data may be processed within EU territory by companies incorporated under US law or their subsidiaries.⁴¹ In this regard, the *Conseil d'État* went even further than the CJEU by ruling in a case where data concerning health were processed by the

³⁶ Ibid., at 7 (para. 4) and 9 (para. 10).

³⁷ N. Cory *et al.*, 'Principles and Policies for "Data Free Flow With Trust"', *Information Technology & Innovation Foundation* (27 May 2019), at 9, available at <<https://itif.org/publications/2019/05/27/principles-and-policies-data-free-flow-trust>>.

³⁸ See *supra* note 16.

³⁹ C. Sullivan, 'EU GDPR or APEC CBPR? A comparative analysis of the approach of the EU and APEC to cross border data transfers and protection of personal data in the IoT era', 35 *Computer Law & Security Review* 2019, 380-397, at 385.

⁴⁰ Conseil d'État [Council of State of the French Republic], Case No. 444937, *Association Le Conseil National du Logiciel Libre et autres* [2020], Ordonnance of 13 October 2020, ECLI:FR:CEORD:2020:444937.20201013.

⁴¹ Ibid., para. 18.

subsidiary of a company subject to the surveillance laws of a third country. The *Conseil d'État* pointed out that the applicants did not allege a direct violation of data protection rules, but only the risk of such a breach.⁴² It also found that there is an important public interest in allowing the continued use of data concerning health for the purpose of health emergency management and improvement of knowledge about COVID-19 and, to this end, in permitting the use of the state-of-the-art technical means made available to the Hub by Microsoft Ireland.⁴³ In this case, contracting with Microsoft Ireland is a measure proportionate to the health risks incurred and is appropriate to the circumstances taking account of both the urgency and the absence of a satisfactory alternative technical solution facilitating the performance of tasks within the necessary time limits.⁴⁴ The *Conseil d'État* highlighted that the contract with Microsoft Ireland stipulates that data may not be processed outside the specified geographical zone (the Netherlands).⁴⁵ With regard to those considerations, the *Conseil d'État* found that it was satisfactory for the Hub to undertake to collaborate with Microsoft Ireland, under the supervision of the French Data Protection Authority, on implementing technical measures and appropriate organisational structures in order to guarantee the protection of the rights of the individuals concerned.⁴⁶

4.3. The ruling of the French Council of State concerning Doctolib and AWS

In another case (based on similar arguments), the applicants asked the *Conseil d'État* to suspend the contract between the Minister of Health and Solidarity and Doctolib, an online platform assigned to manage the scheduling of vaccination appointments in France.⁴⁷ Doctolib used the hosting services of AWS Sarl, a company incorporated under Luxembourg law and a subsidiary of Amazon Web Services Inc., a company subject to US surveillance law. The applicants claimed that the partnership with Doctolib was not necessary, proportionate or appropriate given that there were other alternative digital solutions. In view of the data concerned and the implemented safeguards, the *Conseil d'État* found that the level of protection offered to data in the context of the COVID-19 vaccination campaign could not be regarded as manifestly insufficient in light of the risk of infringement of the GDPR.⁴⁸ The *Conseil d'État* held that the data at issue included personal identification data and data relating to appointments, but did not include any health data on the possible medical reasons for vaccination eligibility.⁴⁹ The *Conseil d'État* considered the complementary addendum on

⁴² Ibid., para. 19.

⁴³ Ibid., para. 20.

⁴⁴ Ibid.

⁴⁵ Ibid., para. 12.

⁴⁶ Ibid., para. 21.

⁴⁷ Conseil d'État [Council of State of the French Republic], Case No. 450163, *L'association InterHop et les autres* [2021], Ordonnance of 12 March 2021, ECLI:FR:CEORD:2021:450163.20210312.

⁴⁸ Ibid., para. 9.

⁴⁹ Ibid.

data processing between Doctolib and AWS as providing a sufficient level of protection. In this addendum, the parties established a specific procedure for challenging any request made by a public authority to access data processed on behalf of Doctolib that did not comply with EU law.⁵⁰ In addition to this, Doctolib set up a data security system hosted by AWS in its data centres in France and Germany, through an encryption procedure based on a trusted third party located in France, in order to prevent the data from being seen by third parties.⁵¹

4.4. **The decision of the Portuguese Data Protection Authority concerning the Portuguese National Statistical Institute**

In a substantially different case, the Portuguese Data Protection Authority (CNPd) ordered the Portuguese National Institute for Statistics (INE) to suspend any transfers of personal data (including data concerning health) collected by INE in the 2021 Census to third countries that did not guarantee an adequate level of data protection.⁵² INE had used the cyber security and Content Delivery Network services of Cloudflare, a company subject to US surveillance law. INE had accepted Cloudflare's terms and conditions relying on standard data protection clauses for transferring personal data to third countries. However, this contract allowed the transit of personal data through servers used by Cloudflare located in the US and other third countries, which did not offer an adequate level of protection. The contract also authorised Cloudflare to use sub-processors from outside its group, including third country companies. The contract noted that Cloudflare may be subject to data disclosure requests by the US government, which may be inconsistent with the GDPR, and those requests may prohibit the controller from being notified. In its assessment, the CNPD found that despite the use of standard data protection clauses, INE did not implement adequate and sufficient supplementary measures, which would have ensured an equivalent level of protection for transfers of personal data to third countries.⁵³ Moreover, INE did not carry out a Data Protection Impact Assessment for this specific processing operation and did not consult the supervisory authority prior to processing.⁵⁴

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Comissão Nacional de Proteção de Dados [National Data Protection Commission of the Portuguese Republic], *Deliberação/2021/533*, 27 April 2021, AVG/2021/401, para. 42.

⁵³ Ibid., para. 30–40.

⁵⁴ Ibid., para. 20.

5. THE NEED FOR SECTOR-SPECIFIC LEGAL AVENUES AND SUPPLEMENTARY MEASURES TO FACILITATE LAWFUL TRANSFERS OF DATA CONCERNING HEALTH OUTSIDE THE EU/EEA

5.1. Transfers on the basis of an adequacy decision by the Commission in the healthcare sector

An adequacy decision offers the most comprehensive, straightforward and cost-effective solution for transferring personal data (concerning health) outside the EU/EEA.⁵⁵ It “assimilates” data transfers to intra-EU/EEA data transmissions in order to provide legal certainty and uniformity throughout the EU/EEA regarding the adequate level of protection offered by the other jurisdiction. Despite its advantages, this legal avenue has several weaknesses. The adequacy assessment procedure was designed to satisfy a far simpler and largely bilateral international environment for personal data transfers.⁵⁶ It is less suited to coping with a ubiquitous and multi-directional digital sphere labelled as the ‘Internet of Everything’. In connection with this, it is important to note that the image of ‘movement’ given by the notion of ‘data transfers’ is not, in reality, actually the movement or transfer of data but actually data processing operations typically consisting of data replication or remote processing operations.⁵⁷

The GDPR permits adequacy decisions in relation to one or more specified sectors within a third country [Article 45(1)]. In addition to being procedurally easier to achieve, an adequacy regime tailored to data concerning health could support improved responses to new challenges in healthcare, an ecosystem in which there is already substantial convergence in values and approaches.⁵⁸ Moreover, the adoption of a normative definition of ‘transfers of data concerning health’ could help to determine the data sharing arrangements, (remote) access techniques and repository spaces that would be covered by a sector-specific adequacy regime.⁵⁹ However, despite its promise, discussions on adequacy in the context of health and genomics seem to have been incoherent, or even biased, in the past.⁶⁰ The rationale and bases for the Commission’s decisions

⁵⁵ European Commission, Commission Staff Working Document accompanying the document ‘Communication from the Commission to the European Parliament and the Council: Data protection as a pillar of citizens’ empowerment and the EU’s approach to the digital transition – two years of application of the General Data Protection Regulation, COM/2020/264 final’, SWD(2020) 115 final (hereafter: Commission Staff Working Document SWD(2020) 115 final).

⁵⁶ C. Bennett and S. Oduro-Marfo, *supra* note 17, at 886.

⁵⁷ G. G. Fuster, ‘Un-Mapping Personal Data Transfers’, 2(2) *European Data Protection Law Review* 2016, 160-168, at 162.

⁵⁸ L. Bradford *et al.*, *supra* note 23, at 23.

⁵⁹ See L. Drechsler, ‘International Transfer of Health Data Cross-Sectoral Roundtable – Summary Report’, *Federation of European Academies of Medicine (FEAM) European Biomedical Policy Forum* (16 October 2020), at 4, available at <<https://www.feam.eu/wp-content/uploads/ITHD-Summary-report-5-Nov-2020-FINAL.pdf>>; T. Mulder and M. Tudorica, ‘The GDPR Transfer Regime and Modern Technologies’, 19 *University of Groningen Faculty of Law Research Paper* 2020, at 5-7.

⁶⁰ See J. Stoddart *et al.*, *supra* note 12, at 147-149.

to grant or deny adequacy should become more transparent and predictable in order to reduce the lack of understanding both in the EU and in third countries.⁶¹ In this respect, it is important to bear in mind that it seems illusionary to assert unilaterally EU legal standards (and underlying bureaucratic mechanisms) globally ('Brussels effect').⁶² Calls for digital sovereignty, the emergence of a "Eurocentric" approach to data governance and the creation of a European Health Data Space could hamper efforts to approximate the privacy and data protection laws of third countries with EU law.⁶³ Moreover, it would be advisable to avoid a situation whereby the supervisory body of a third country, tasked with monitoring the processing of data concerning health originating from the EU/EEA, was asked to treat data concerning the health of EU/EEA citizens differently from personal data of the citizens of the third country itself.⁶⁴

5.2. Transfers subject to appropriate safeguards provided by the controller or processor specific to transfers of data concerning health

Article 46(2) of the GDPR sets out other legal avenues that may be relied upon by the controller to provide appropriate safeguards for transfers of data concerning health (on the condition that enforceable data subject rights and effective legal remedies for data subjects are available). These transfer tools are the following:

- "(a) a legally binding and enforceable instrument between public authorities or bodies;
- (b) binding corporate rules ...;
- (c) standard data protection clauses adopted by the Commission ...;
- (d) standard data protection clauses adopted by a supervisory authority and approved by the Commission ...;
- (e) an approved code of conduct pursuant to Article 40 ...; or
- (f) an approved certification mechanism pursuant to Article 42."

5.2.1. International legal instruments

The GDPR allows appropriate safeguards to be ensured for transfers of personal data (concerning health) on the bases of international agreements [Article 46(2)(a)] or administrative arrangements [Article 46(3)(b)] between public

⁶¹ C. Pauletto, 'Options towards a global standard for the protection of individuals with regard to the processing of personal data', 40(105433) *Computer Law & Security Review* 2021, at 14.

⁶² C. Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post Schrems', 18(4) *German Law Journal* 2017, 881-918, at 917.

⁶³ See F. Naftalski, *What are the main trends in regulatory responses to Schrems II*, Ernst & Young (31 March 2021), available at <https://www.ey.com/en_gl/law/regulatory-response-trends-to-schrems-ii-decision>.

⁶⁴ Cf. R. H. Weber, *supra* note 11, at 124; J. Reichel, 'Oversight of EU medical data transfers – an administrative law perspective on cross-border biomedical research administration', 7 *Health and Technology* 2017, 389-400, at 398.

authorities or bodies. While both instruments must guarantee the same outcome in terms of appropriate safeguards, including the availability of enforceable data subject rights and of effective legal remedies, they differ in their legal nature and their adoption procedure. Unlike international agreements, which create binding obligations under international law, administrative arrangements (e.g. a memorandum of understanding) are generally not binding and, therefore, require *ex ante* authorisation by the competent supervisory authority (typically the national data protection authority).⁶⁵

Considering that transfers of data concerning health, particularly those relating to scientific research purposes, are unique forms of international data transfers (usually subject to separate legal and ethical conditions), the conclusion of bilateral or multilateral agreements or administrative arrangements outlining principles governing international health data transfers could insulate them from problematic jurisdictional conflicts.⁶⁶ The scope and content of these normative instruments could be tailored to specific purposes (e.g. the needs and functions of scientific research), which would reduce the legal uncertainty. In order to respond to technological developments and to support innovation, these normative instruments should not only cover transfers of data concerning health and their protection, but should also recognise and protect the free movement and value of the proprietary algorithms of underlying new health information technologies.⁶⁷ In addition, an international organisation (e.g. a specialised UN agency, practically: the World Health Organization) could be delegated to administer the implementation of these normative instruments, attempting to harmonise critical points of divergences and helping to settle any disputes.⁶⁸

5.2.2. *Binding corporate rules*

The use of binding corporate rules (BCR), approved by the competent supervisory authority, permits transfers of personal data between the various undertakings of a multi-jurisdictional corporate group. Although BCR constitute a possible legal avenue, they are not yet of great significance in the context of healthcare. However, since there is a gradual uptake of IoT-enabled solutions for monitoring the health and well-being of employees, BCR may well become more relevant in future.

5.2.3. *Standard data protection clauses*

The most widely used transfer tool under Article 46 of the GDPR is standard data protection clauses, i.e. standard (model) contractual clauses (SCC) incor-

⁶⁵ Commission Staff Working Document SWD(2020) 115 final, *supra* note 55, at section 7.2.

⁶⁶ D. Hallinan *et al.*, *supra* note 30, at 5-6.

⁶⁷ See World Economic Forum, *supra* note 9, at 38.

⁶⁸ Cf. P. De Hert and V. Papakonstantinou, 'Three Scenarios for International Governance of Data Privacy: Towards an International Data Privacy Organization, Preferably a UN Agency?', 9 *I/S: A Journal of Law and Policy for the Information Society* 2013, 271-324, at 321-322; ALLEA *et al.*, 'International Sharing of Personal Health Data for Research' (April 2021), at 35, available at <www.doi.org/10.26356/IHDT>.

porated voluntarily by the data exporter and the data importer into their contractual arrangements, establishing requirements for the implementation of appropriate safeguards.⁶⁹ Although SCC were originally designed to be bilateral contractual agreements, this does not exclude the possibility of incorporating them into multilateral agreements between the parties of a consortium.⁷⁰ Although they are broadly used, SCC are often considered inflexible, particularly for transfers of data concerning health. Given that SCC cover all types of personal data transfers, they contain either too onerous or too vague terms for health-related purposes and may even be in conflict with the laws of third countries.⁷¹ By adding clarifications, however, there is a risk that SCC may be undermined or their spirit contradicted, thereby eliminating the desired legal justification for transfers of data concerning health.⁷² SCC should be adapted to permit more flexibility in reflecting the specific circumstances and relationships between the parties.⁷³ In this regard, the revised Commission Implementing Decision (EU) 2021/914 on standard contractual clauses for the transfer of personal data to third countries⁷⁴ seems to provide more adjustability to cover new data transfer scenarios and more complex processing operations.⁷⁵ However, it remains to be seen whether data protection safeguards enshrined in these SCC will operate consistently with the legal concepts introduced by the Data Governance Act.⁷⁶

5.2.4. Codes of conduct and certification mechanisms

Stakeholders are keen to develop two further data transfer mechanisms under the GDPR: codes of conduct [Article 46(2)(e) pursuant to Article 40] and certification mechanisms [Article 46(2)(f) pursuant to Article 42].⁷⁷ Both instruments are bottom-up tools (and may be part of a middle-out approach) allowing for tailor-made solutions which reflect, for instance, the specific features and needs

⁶⁹ Commission Staff Working Document SWD(2020) 115 final, *supra* note 55, at section 7.2.

⁷⁰ P. Kosseim *et al.*, 'Building a data sharing model for global genomic research', 15 *Genome Biology* 2014, at 4.

⁷¹ L. Bradford *et al.*, *supra* note 23, at 8-9.

⁷² M. Phillips, *supra* note 14, at 580.

⁷³ Multistakeholder expert group to support the application of Regulation (EU) 2016/679, *Contribution from the Multistakeholder expert group to the Commission: 2020 Evaluation of the General Data Protection Regulation*, Report (17 June 2020), at 26, available at <<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=41708>>.

⁷⁴ Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council, C/2021/3972, OJ [2021] L 199/31, 7.6.2021.

⁷⁵ European Data Protection Board and European Data Protection Supervisor, Joint Opinion 2/2021 on the European Commission's Implementing Decision on standard contractual clauses for the transfer of personal data to third countries for the matters referred to in Article 46(2)(c) of Regulation (EU) 2016 (14 January 2021), at 7 (para. 18).

⁷⁶ Cf. European Data Protection Board, Statement 05/2021 on the Data Governance Act in light of the legislative developments (19 May 2021), at 1-5.

⁷⁷ See Multistakeholder expert group to support the application of Regulation (EU) 2016/679, *supra* note 73, 37.

of the health sector or health data flows. Their scope of subjects may also include controllers and processors located in third countries, and involve accredited bodies providing assurance outside the EU/EEA on conformity with the criteria established by these instruments. Certification mechanisms are flexible, scalable and provide upfront assurance, but it can be challenging to reach agreements on framework rules, to pass the rigorous upfront scrutiny needed to gain entry, and to determine which bodies qualify as legitimate third party certifiers.⁷⁸ ISO 27701 (the Personal Information Management Systems extension to the ISO 27001 Information Security Management System) has been proposed as a possible GDPR certification mechanism that could be of relevance in this context.⁷⁹ From an organisational perspective, the APEC CBPR provides an example of how oversight mechanisms can be established (although its relationship between the normative criteria and redress mechanisms does not fully correspond to the conditions of certification mechanisms established in the GDPR).⁸⁰

In comparison with certification mechanisms, codes of conduct are more cost-effective and better suited to controllers/processors performing a particular sector-specific activity.⁸¹ The advantage of having a sector-based code of conduct in the healthcare industry (covering transfers of data concerning health) is that it would be accessible to all organisational stakeholders in the health data ecosystem, regardless of the resources available to them.⁸² Although the EDPB has adopted guidelines to foster their use, work is still ongoing to develop criteria to approve them as international data transfer tools. Current initiatives for codes of conducts, which could be of relevance in this context, are still in their preparatory phases or have not been approved. To ensure its universal application and accountability, a code of conduct covering international transfers of data concerning health could be positioned within the human rights framework and could support the implementation of the right to benefit from scientific progress and its applications.⁸³

5.3. Supplementary measures specific to transfers of data concerning health in addition to appropriate safeguards provided by the controller or processor

If the data exporter's assessment reveals that its Article 46 GDPR transfer tool is not effective, then it will need to consider (if appropriate, in collaboration with

⁷⁸ P. Kosseim *et al.*, *supra* note 70, 4-5.

⁷⁹ C. Compagnucci *et al.*, 'Lost on the High Seas without a Safe Harbor or a Shield? Navigating Cross-Border Data Transfers in the Pharmaceutical Sector After Schrems II Invalidation of the EU-US Privacy Shield', 4 *European Pharmaceutical Law Review* 2020, 153-160, at 46.

⁸⁰ I. Kamara *et al.*, *Data Protection Certification Mechanisms, Study on Articles 42 and 43 of the Regulation (EU) 2016/679*, Final Report (Luxembourg: Publications Office of the European Union 2019), at 214-216.

⁸¹ Commission Staff Working Document SWD(2020) 115 final, *supra* note 59, at section 7.2.

⁸² See D. D. Hirsch, 'In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Codes of Conduct', 74 *Ohio State Law Journal* 2013, 1029-1069, at 1053-1054.

⁸³ B. M. Knoppers *et al.*, 'A human rights approach to an international code of conduct for genomic and clinical data sharing', 133 *Human Genetics* 2014, 895-903, at 898-901

the data importer) whether supplementary measures exist, which, when added to safeguards embodied in transfer tools, can ensure that the transferred data is afforded a level of protection in the third country essentially equivalent to that guaranteed within the EU/EEA. The data exporter must identify on a case-by-case basis the supplementary measures that could be effective for data transfer to a third country when using a specific Article 46 GDPR legal avenue.⁸⁴ In principle, supplementary measures may have a technical, additional contractual or organisational nature.⁸⁵ The combination of these different measures can enhance the level of protection, and may therefore contribute to reaching the level of EU data protection standards.⁸⁶

5.3.1. *Technical measures*

Technical measures are intended to ensure that access to the transferred data by public authorities in third countries does not impinge on the effectiveness of the appropriate safeguards contained in the Article 46 GDPR transfer tools.⁸⁷ In this respect, the following solutions are considered effective supplementary measures for the protection of data concerning health:⁸⁸

- state-of-the-art encryption of data storage for backup purposes that does not provide access to unencrypted data concerning health;
- transfer of pseudonymised data (concerning health) with appropriate technical and organisational safeguards;
- data concerning health merely transiting through third countries;
- a data exporter transfers data concerning health using state-of-the-art encryption to a data importer in a third country, whose law exempts the data importer from potentially infringing access to the data, e.g. by virtue of professional/medical secrecy; or
- split or multi-party processing, i.e. prior to transmission, the data exporter splits personal data (concerning health) in a way that does not allow individual processors (acting as data importers) to receive sufficient amounts of data to reconstruct the personal data (concerning health) in whole or in part.

It is important to emphasise that cases where unencrypted data concerning health are technically necessary for the provision of a service, such as transfers of data concerning health to third country cloud service providers or other processors, which require access to such data, do not qualify as appropriate supplementary measures.⁸⁹ In these scenarios, there is a risk of ‘data mingling’, i.e. data concerning health may mix with other data, and cloud processors might

⁸⁴ EDPB Recommendations 01/2020 (*supra* note 32), at 15 (para. 46).

⁸⁵ *Ibid.*, at 15 (para. 47).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at 21-22 (para. 74).

⁸⁸ See *ibid.*, at 22-26 (para. 79-86).

⁸⁹ See *ibid.*, at 26-27 (para. 88-89).

actively ‘mine’ data concerning health to gain intelligence for commercial gains.⁹⁰ It is also worth noting that there are technical measures that do not involve actual transfers of data concerning health, such as remote access to data via a thin client (data visitation) or by remote execution.⁹¹ To counter the misuse of techniques by which extra-jurisdictional insights into data concerning health might be obtained (without the data leaving the local server), the locally stored data concerning health can be tagged/referenced.⁹² The data tag/reference is suitable to make a request to the data repository in the receiving country, and each of those requests can be authorised by the data exporter.⁹³

Alternatively, distributed ledger technologies (DLT) can be implemented, given that they can help to document the origin and complete historical record of data in an immutable or tamper-evident record. In this case, every instance of data transfer or other form of data processing becomes traceable. DLT have been proposed as a solution for structuring the system rules (transactions, governance and operations) of transborder data networks in the post-*Schrems II* environment.⁹⁴ DLT could be deployed to provide an ecosystem in which individuals can maintain ownership of their data concerning health (personal electronic health records) and decide how to share their data and under what conditions.⁹⁵ DLT solutions could provide opportunities to automate the data access control procedure and improve transparency and fairness in accessing data concerning health, while the enforceability of access agreements could be improved by using DLT-based smart contracts.⁹⁶

5.3.2. Additional contractual measures

Additional contractual measures may complement and reinforce the safeguards provided by the transfer tool and the legislation of the third country, when these do not meet all the conditions required to ensure a level of protection essentially equivalent to that guaranteed within the EU/EEA.⁹⁷ Possible additional contractual measures may include:⁹⁸

⁹⁰ J. J. M. Seddon and L. W. Currie, ‘Cloud computing and trans-border health data: Unpacking U.S. and EU healthcare regulation and compliance’, 2 *Health Policy and Technology* 2013, 229-241, at 233-234.

⁹¹ See D. Hallinan *et al.*, *supra* note 30, at 5.

⁹² World Economic Forum, *supra* note 9, at 38.

⁹³ *Ibid.*

⁹⁴ E. Renieris and D. Greenwood, ‘Unlocking blockchain data flows in the wake of *Schrems II*’, *MIT Computational Law Report* (14 August 2020), at 7, available at <<https://law.mit.edu/pub/unlockingblockchaindataflowsinthewakeofschremsii/release/1>>.

⁹⁵ A. Dubovitskaya *et al.*, ‘Applications of Blockchain Technology for Data-Sharing in Oncology: Results from a Systematic Literature Review’, 98 *Oncology and Informatics – Review* 2020, 403-411, at 404.

⁹⁶ M. Shabani, ‘Blockchain-based platforms for genomic data sharing: a de-centralized approach in response to the governance problems?’, 26 *Journal of the American Medical Informatics Association* 2019, 76-80, at 79.

⁹⁷ EDPB Recommendations 01/2020 (*supra* note 32), at 28 (para. 93).

⁹⁸ *Ibid.*, at 29-34 (paras. 99-121).

- obligation of both parties to use specific technical measures;
- transparency obligations of the data importer (which could include the power of the data exporter to conduct audits and the obligation of the data importer to inform the data exporter promptly of its inability to comply with the contractual commitments); or
- *ad hoc* redress mechanisms to empower data subjects to exercise their rights.

In order to enhance the transparency and accountability of contractual arrangements, the legal responsibilities of those involved should be clarified once the data transfer takes place.⁹⁹ According to one argument, data exporters should remain liable under most circumstances for data protection breaches caused by data importers, as the data exporter is likely to be the entity that is more easily accessible for the data subject.¹⁰⁰ On the other side, data importers should demonstrate their capacity to provide assurances that adequate protection mechanisms are in place.¹⁰¹

5.3.3. *Additional organisational measures*

Additional organisational measures may help to ensure consistency in the protection of data concerning health during the full data processing cycle. These measures may consist of internal policies, organisational methods and standards that data exporters can apply and impose on data importers in third countries.¹⁰² Possible organisational measures may include:

- clear allocation of responsibility for transfers of data concerning health (e.g. appointment of a project team);
- data access and confidentiality policies and best practices, based on data minimisation measures and a strict ‘need-to-know’ principle, monitored by regular audits; or
- timely involvement of the Data Protection Officer and Internal Audit Department.

In the case of international health research collaborations, research ethics committees play a pivotal role (in combination with national supervisory bodies) in ensuring that ‘appropriate safeguards’ are in place before the launch of cross-jurisdictional projects.¹⁰³ From an inter-organisational perspective, international health data trusts or a network of national health data trusts residing in different jurisdictions could act as data intermediaries by managing data con-

⁹⁹ See F. Molnár-Gábor, ‘Germany: a fair balance between scientific freedom and data subjects’ rights?’, 137 *Human Genetics* 2018, 619-626, at 626.

¹⁰⁰ World Economic Forum, *supra* note 9, at 29.

¹⁰¹ J. Alhadeff *et al.*, ‘The Accountability Principle Data Protection Regulation: Origin, Development and Future Directions’, in D. Guagnin *et al.* (eds.), *Managing Privacy through Accountability* (Basingstoke: Palgrave Macmillan, 2012), 49-82, at 68-69.

¹⁰² *Ibid.*, at 35 (para. 122).

¹⁰³ J. Reichel, *supra* note 63, at 391, 399.

cerning health on behalf of data suppliers in a federated health data ecosystem.¹⁰⁴

5.4. Derogations for specific situations in the healthcare sector

If neither an adequacy decision nor any other transfer tool is available, then transfers of data concerning health outside the EU/EEA may be performed based on one of the ‘specific situation’ grounds outlined in Article 49 of the GDPR. The legal justifications (derogations), which are mostly relevant in the health-related domain are the following:

- “(a) the data subject has explicitly consented to the proposed transfer ...;
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject’s request; [...]
- (d) the transfer is necessary for important reasons of public interest; [...]
- (f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent”.

These derogations must be interpreted restrictively.¹⁰⁵ As derogations do not provide adequate protection or appropriate safeguards for data concerning health, these avenues carry increased risks for the rights of the data subject concerned.¹⁰⁶ Although the explicit and specific consent of the data subject for a particular (set of) transfer(s), after having been informed of the possible risks of such transfers, may be considered a valid legal ground, the EDPB has reiterated that even in this case, data transfers occurring periodically or under random circumstances and within arbitrary time intervals are inappropriate.¹⁰⁷ This narrow interpretation of consent should be borne in mind, in particular, by developers and operators of IoT-enabled telehealth systems that are dependent on transborder data flows. In other situations, the data exporter must perform a necessity test to evaluate whether the transfer of data concerning health is necessary for the specific purpose of a derogation.¹⁰⁸ For example, if a contract exists between a health app service provider and a user, the controller must be able to demonstrate that the transfer of data concerning health outside the EU/EEA has a close and substantial link to the main purpose of the contract.¹⁰⁹ In the event of medical emergency, or when the data subject does not have the physical, mental or legal ability to make a valid decision, the transfer of data concerning health must be necessary for the purpose of an essential diagnosis.¹¹⁰

¹⁰⁴ See World Economic Forum, *supra* note 9, at 39–40.

¹⁰⁵ European Data Protection Board, Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 (25 May 2018) (hereafter: EDPB Guidelines 2/2018), at 4.

¹⁰⁶ See *ibid.*

¹⁰⁷ Cf. *ibid.*, at 4–8; European Data Protection Board, Guidelines 05/2020 on consent under Regulation 2016/679, Version 1.1 (4 May 2020), at 20 (footnote 47).

¹⁰⁸ EDPB Guidelines 2/2018, *supra* note 105, at 5.

¹⁰⁹ L. Bradford *et al.*, *supra* note 23, at 9.

¹¹⁰ EDPB Guidelines 2/2018, *supra* note 105, at 12–13.

The EDPB considers that the fight against COVID-19 has been recognised by the EU and its Member States as an ‘important public interest’, “which may require urgent action in the field of scientific research (for example to identify treatments or develop vaccines), and may also involve transfers to third countries or international organisations.”¹¹¹ The EDPB has stated that:

“[p]ublic authorities and private entities may, under the current pandemic context ... rely upon the applicable derogations mentioned above, mainly as a temporary measure due to the urgency of the medical situation globally. [...] Indeed, if the nature of the COVID-19 crisis may justify the use of the applicable derogations for initial transfers carried out for the purpose of research in this context, repetitive transfers of data to third countries part of a long lasting research project in this regard would need to be framed with appropriate safeguards in accordance with Article 46 GDPR.”¹¹²

This guideline has been criticised due to its lack of urgency with regard to the consideration that epidemiological research requires access to data over time to conduct longitudinal studies; a ‘temporary measure’ does not suffice in the long-term.¹¹³ For this reason, the list of ‘derogations for specific situations’ could be expanded to include a legal avenue for cases when ‘transfer is necessary for scientific research in an epidemiological context’ subject to appropriate supplementary measures.¹¹⁴

6. CONCLUSION

The COVID-19 crisis and the CJEU’s *Schrems II* judgment have intensified the data protection challenges for entities involved in transfers of data concerning health from the EU/EEA to third countries. By analysing the underlying policy considerations and the implications of *Schrems II* and its impact on subsequent case law and authoritative legal interpretations, this paper argues that the adoption of legal avenues and the implementation of supplementary measures tailored to the specificities of the healthcare sector would reduce barriers and facilitate transfers of data concerning health. Considering that data concerning health generally enjoy distinct normative treatment, this paper proposes the adoption of sector-specific international legal instruments, adequacy decisions, codes of conduct, certification mechanisms and a specific derogation for scientific research in healthcare. In addition to appropriate safeguards provided by the controller or processor, the effective deployment of technical, contractual and organisational measures can ensure that the level of protection afforded to data concerning health in a third country is essentially equivalent to that guaranteed within the EU/EEA.

¹¹¹ European Data Protection Board, Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak (21 April 2020), at 12-13 (para. 63).

¹¹² Ibid., at 13 (paras. 66-67).

¹¹³ See J. Bovenberg *et al.*, *supra* note 27, at 41.

¹¹⁴ Ibid., at 42.

SHARED SOLUTIONS OR TERRITORIAL EXTENSION OF EU LAW? A POSSIBLE ANSWER FOR THE EU TO THE FOREIGN SUBSIDIES PROBLEM

Nicola Bergamaschi*

1. INTRODUCTION

Recently, the European Commission brought to public attention the existence of a problem related to foreign subsidies, i.e. subsidies granted by third countries, which threaten to affect competition within the EU internal market. According to the White Paper issued by the Commission, the EU legal order was found not to have appropriate instruments able to protect competition in the internal market from this kind of threat.¹

There are essentially two possible answers to the problem of foreign subsidies. On one hand, the EU has several international agreements in place which deal with the issue of foreign subsidies. The conclusion of such agreements represents a shared solution to this problem, agreed with EU external partners. However, only a few countries agree to conclude treaties with the EU containing stringent rules on subsidies, namely rules that go beyond the WTO regime and are closer to EU state aid law. On the other hand, the Commission has proposed the adoption of a regulation to establish a screening mechanism.² This new instrument is designed to identify foreign subsidies and to react with redress measures targeting subsidised undertakings, in order to neutralise any negative effects on the internal market. The legal machinery designed by the Commission seems to operate through the territorial extension of EU law,³ taking internal measures to address conduct that occurred abroad. On this basis, the solution proposed by the Commission appears to be the expression of a strong unilateralist approach.

Therefore, this paper aims to investigate the interplay between EU unilateralism, evidenced by the territorial extension of EU law, and the quest for shared solutions with third countries, when dealing with an internal legal problem originating abroad.

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¹ COM/2020/253 final from the Commission of 17 June 2020, White Paper on levelling the playing field as regards foreign subsidies.

² Communication COM(2021) 223 final from the Commission of 5 May 2021, Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market.

³ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *The American Journal of Comparative Law* 2014, 87-125; J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 21-63

The paper is made up of four main sections. Section 1 presents the problem of foreign subsidies and the regulatory gap outlined by the Commission. Section 2 examines different kinds of international agreements containing rules on foreign subsidies concluded to date by the EU. In particular, the list of agreements includes EEA Agreements, Stabilisation and Association Agreements, Association Agreements, the EU-UK Trade and Cooperation Agreement, and Free Trade Agreements. Section 3 analyses the screening mechanism envisaged by the Commission and attempts to assess the possible territorial extension effect of that legal machinery. Section 4 explores the relationship between the unilateralism of the screening mechanism and the shared solution represented by the international agreements examined above, attempting to define the approach followed by the EU, between assertiveness and openness.

2. THE PROBLEM OF FOREIGN SUBSIDIES AND THE NEED TO ACT

In June 2020, the European Commission adopted the White Paper on foreign subsidies⁴ in which the institution explains its proposal to protect the level playing field between internal market players from the perils of foreign subsidies, which are liable to undermine internal competition.

The Commission bases its proposals on the assumption that '[t]he current global economic environment is the most difficult in recent memory.'⁵ It is also evident that the Commission is concerned about increasing protectionism and state-sponsored unfair trading practices, which jeopardise the internal market and the capacity of EU companies to penetrate external markets.⁶ Consequently, the traditional openness and attractiveness of the EU single market should be balanced with legal instruments designed to protect the EU from unfair and abusive practices.⁷

Against this background, the Commission thoroughly outlines the risks for competitiveness and the level playing field in the EU internal market due to subsidisation, with a specific mention of the possible distortion in the field of acquisition of EU target and public procurement.⁸ The analysis carried out by the Commissions highlights that foreign subsidies represent a real threat for the EU internal market due to a regulatory gap in the EU legal framework. Indeed,

⁴ See 'Editorial comments: Protecting the EU's internal market in times of pandemic and growing trade disputes: Some reflections about the challenges posed by foreign subsidies', 57 *Common Market Law Review* 2020, 1365-1382.

⁵ White Paper, *supra* note 1, at 4.

⁶ On the risk represented by China, see V. Crochet and V. Hedge, 'China's "Going Global" Policy: Transnational Production Subsidies under the WTO SCM Agreement', 23 *Journal of International Economic Law* 2020, 841-863; P. Van Vaerenbergh, 'EU Trade Defence Policy against Unfair Trade from Chinese SOEs: Unilateral or Multilateral Approaches', Geneva Jean Monnet Working Papers 01/2019, available at <https://www.ceje.ch/files/6915/7381/7014/Van_Vaerenbergh_final_2019-01_.pdf>.

⁷ The openness of the internal market towards the fundamental freedom of capital movement also extends to third country nationals, see S. Schill, 'The European Union's Foreign Direct Investment Screening Paradox', Amsterdam Law School Legal Studies Research Paper No. 2019-17, 11-16, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434475>.

⁸ White Paper, *supra* note 1, 6-8.

internal competition rules, particularly state aid law, do not cover subsidies coming from third countries. Furthermore, the scope of the existing subsidies discipline, contained in the WTO Agreement on Subsidies and Countervailing Measures (ASCM)⁹ and implemented internally by way of the Anti-Subsidy Regulation,¹⁰ is limited to trade in goods, while it does not cover trade in services, or investments concerning the establishment of other financial flows related to undertakings operating in the EU.¹¹ The latter are addressed by the recent established framework for the screening of foreign direct investment (FDI),¹² but that screening mechanism is intended only to protect security and public order within the EU and the Member States, thus not being suited to pursuing competition regulation. Finally, the same holds true for the existing sets of rules in the field of public procurement and access to EU funding, which do not take account of the issue of foreign subsidies.¹³

The Commission proposes to fill this gap by means of a new internal legal instrument (section 4), but the EU already has in place several international agreements dealing with the issue of foreign subsidies.

3. THE SHARED SOLUTION: EXISTING INTERNATIONAL INSTRUMENTS AT THE EU'S DISPOSAL

The WTO ASCM is the main international instrument to address the subsidisation issue. As mentioned above, the scope of application of the ASCM appears to be insufficient for tackling the specific problem of EU foreign subsidies.¹⁴ The WTO definitely offers a venue for a possible multilateral solution, although this solution is far from being achieved. Recently, with a Joint Statement,¹⁵ the EU Trade Commissioner and the Japan and USA Trade Ministers pointed out the shortcomings of current WTO law in the field of subsidies and discussed pos-

⁹ Uruguay Round of Multilateral Trade Negotiations (1986- 1994) – Annex 1 – Annex 1A – Agreement on Subsidies and Countervailing Measures (WTO-GATT 1994), OJ [1994] L 336, 23.12.1994, 156-183.

¹⁰ Regulation No. 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ [2016] L 176, 30.6.2016, 55-91.

¹¹ COM/2021/223 final from the Commission of 5 May 2021, Proposal for a Regulation of The European Parliament and of the Council on foreign subsidies distorting the internal market, p. 53. See V. Crochet, M. Gustafsson, 'Lawful remedy or illegal response? Resolving the issue of foreign subsidisation under WTO Law', KU Leven Working Papers No. 226, 2020, 10-15, available at <<https://ghum.kuleuven.be/ggs/wp226-crochet-gustafsson.pdf>>.

¹² Regulation No. 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ [2019] L 79I, 21.3.2019, 1-14. *Ex multis*, see S. Hindelang and A. Moberg, 'The art of casting political dissent in law: the EU's framework for the screening of foreign direct investment', 57 *Common Market Law Review* 2020, 1427-1460.

¹³ White Paper, *supra* note 1, 10-12.

¹⁴ See *supra*, note 11.

¹⁵ Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, available at <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf>. S. Li and X. Tu, 'Reforming WTO Subsidy Rules: Past Experiences and Prospects', 54 *Journal of World Trade* 2020, 853-888.

sible ways of amending the ASCM and enhancing the multilateral regulation of the matter. However, it is argued that an actual review of the agreement will take quite some time.¹⁶ Furthermore, although the Joint Statement proposed new categories of prohibited subsidies and specific remedies to the existing legal weaknesses of ASCM provisions, it still does not take account of subsidies related to trade in services. Thus, even if amended, the ASCM would not fill the gap in EU regulations as described in the White Paper. Consequently, bilateral agreements represent a more efficient way of pursuing shared solutions.

Setting aside the multilateral option, it should be noted that the EU is currently party to several bilateral trade agreements which deal with subsidies in different ways, following two main approaches. Generally speaking, agreements that follow the 'state aid approach' establish sets of rules similar or identical to EU state aid law. That means that any aid is prohibited under the same conditions as Art. 107 TFEU and the prohibition has the same scope *ratione materiae* as the EU internal state aid regime.¹⁷ On the other hand, 'WTO plus approach' agreements incorporate WTO subsidies rules, building on the ASCM regime and adding new obligations, but they do not go much further.¹⁸

The next subsections will offer a brief overview of these two categories of bilateral agreements¹⁹ so as to assess the feasibility of the bilateral option. As will be demonstrated, this depends on the degree of closeness between the EU and the third country.

3.1. Agreements containing state aid rules

An initial example of an agreement containing state aid provisions is the EEA Agreement.²⁰ Although it does not actually belong to the family of bilateral instruments, 'it is the closest form of relationship, other than full membership, that the EU has ever offered to neighbouring countries'.²¹ Precisely due to this special relationship between the EFTA states (except Switzerland) and the EU, the EEA

¹⁶ See 'Editorial comments: Protecting the EU's internal market in times of pandemic and growing trade disputes', *supra* note 4, at 1376.

¹⁷ The state aid rules apply when the beneficiary of a measure is an 'undertaking', i.e. an entity engaged in an economic activity, regardless of the nature of the field of activity. See Commission Notice on the notion of state aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946 OJ [2016] C 262, 19.7.2016, 1-50. See, also, R. Plender, 'Definition of Aid', in A. Biondi *et al.* (eds.), *The Law of State Aid in the European Union*, (Oxford: Oxford University Press 2003), 3-39.

¹⁸ White Paper, *supra* note 1, at 43. See, also, Global Forum on Competition, *Competition Provisions in Trade Agreements – Contribution from the European Union*, DAF/COMP/GF/WD (2019) 7, 3-5, available at <[https://one.oecd.org/document/DAF/COMP/GF/WD\(2019\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2019)7/en/pdf)>.

¹⁹ For a review of EU international agreements dealing with subsidies and state aid, see L. Borlini and C. Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements', 23 *Columbia Journal of European Law* 2017, 551-606; K. Bacon (ed.), *European Union Law of State Aid* (Oxford: Oxford University Press 2017), 125-150.

²⁰ Agreement on the European Economic Area, OJ [1994] L 1, 3.1.1994, 3-522.

²¹ G. Avery, 'The European Economic Area revisited', European Policy Centre, at 1m available at <https://wms.flexious.be/editor/plugins/imagemanager/content/2140/PDF/2012/The_European_Economic_Area_revisited.pdf>.

Agreement contains a state aid regime that is shaped on the model of EU state aid law.²² Article 61 of the agreement, which lays down the main substantive state aid provisions, is, *mutatis mutandis*, identical to Article 107 TFEU. Moreover, the Agreement provides for a solid enforcement mechanism of state aid rules, based on the role of the EFTA Surveillance Authority (ESA),²³ which is parallel and equivalent to that operated by the Commission within the EU.²⁴ The ESA's decisions are published in the Official Journal of the EU, just like those of the Commission,²⁵ and the two institutions cooperate to ensure the uniform application of state aid rules,²⁶ while the EFTA Court follows the case law of the ECJ.²⁷ Finally, in the event of disputes between the Parties, Art. 64 provides for a concerted solution within the EEA Joint Committee and for the possibility to adopt '[...] definitive measures, strictly necessary to offset the effect of such distortion'.²⁸ Therefore, the EEA agreement represents the perfect example of a solution to the EU foreign subsidies problem which is shared with external partners, but it also represents a *unicum* that is not replicable with other third countries.

A second example is represented by Stabilisation and Association Agreements (SAAs), concluded with formal candidate countries,²⁹ or potential candidates,³⁰ in the Western Balkans.³¹ The *ratio* of this bilateral agreement is to approximate associated countries' legal orders to the *acquis communautaire* in a pre-accession perspective, but also to establish a free-trade framework between them and the EU.³² All SAAs contain the same state aid provisions, which are substantially similar – but not identical in terms – to the TFEU provisions and which prohibit 'any State aid which distorts or threatens to distort

²² See S. Rydelski, 'The EEA State Aid Regime', in *The Law of State Aid in the European Union*, in A. Biondi, *et al.* (eds.), Oxford University Press, 2003, 189-204; T. Joris, 'The European Economic Area and State Aid', in I. Govaere *et al.* (eds.) *The European Union in the World: Essays in Honour of Marc Marescau*, (Leiden: Martinus Nijhoff Publishers, 2014), 417-440.

²³ Art. 62 of the EEA Agreement.

²⁴ See S. Rydelski, *supra* note 22, 192-195.

²⁵ Art. 20, para. 1, of the Protocol 4 on the functions and powers of the EFTA Surveillance Authority in the field of competition, OJ [1994] L 344/12, 31.12.1994, 14-67.

²⁶ Protocol 27 on cooperation in the field of state aid, OJ [1994] L 1, 3.1.1994, 193-194. In general, see S. Norberg *et al.* (eds.), *EEA Law – A commentary on the EEA Agreement* (Stockholm: CE Fritzes AB 1993), 228-233.

²⁷ For some examples, see S. Rydelski, *supra* note 22, 199-204. See, also, S. Rydelski, 'State Aid', in C. Bandenbacher (ed.), *The Handbook of EEA Law* (Cham: Springer 2016), 575-603. On the relationship between the two courts, see H. H. Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area', 79 *Nordic Journal of International Law* 2010, 481-499; C. Timmermans, 'Creative Homogeneity', in M. Johansson *et al.* (eds.), *Liber Amicorum in Honour of Sven Norberg – A European for All Seasons* (Bruxelles: Bruylant, 2006), 471-484.

²⁸ Art. 64, para. 1 of the EEA Agreement.

²⁹ Albania, Montenegro, North Macedonia, Serbia.

³⁰ Bosnia and Herzegovina, Kosovo.

³¹ Prior to the use of SAAs, the enlargement policy and accession procedure were based on the conclusion of Europe Agreements or Association Agreements. For a detailed analysis of the issues related to state aid in those agreements, see P. Schütterle, 'State Aid Control – An Accession Criterion', 39 *Common Market Law Review* 2002, 577-590.

³² See M. Cremona, 'State aid control: Substance and procedure in the Europe agreements and the stabilisation and association agreements', 9 *European Law Journal* 2003, at 266.

competition by favouring certain undertakings or certain products.³³ This clause should be interpreted in light of Art. 107 TFEU and the related EU internal practice, while enforcement is ensured by an internal independent agency.³⁴ Moreover, reciprocal transparency must be guaranteed by the Parties.³⁵ Finally, all SAAs stipulate that '[i]f one of the Parties considers that a particular practice is incompatible with the terms of paragraph 1, it may take appropriate measures after consultation within the Stabilisation and Association Council or after 30 working days following referral for such consultation.'³⁶ Hence, if the associated countries do not maintain the same level of compliance with EU state aid standards as guaranteed in the EEA framework,³⁷ the SAAs provide for the possibility of adopting specific countermeasures.

Lastly, a third category of agreements containing state aid rules is composed by Association Agreements (AAs) concluded in the context of the EU Neighbourhood Policy. Some of the Euro-Mediterranean AAs,³⁸ in particular, contain state aid provisions that are substantially identical to those of the SAAs.³⁹ However, unlike in the case of the SAAs, these Mediterranean partners have not yet harmonised their municipal competition law with EU state aid law, as the clauses on state aid contained in these AAs require implementing rules, which have not yet been adopted.⁴⁰

For other AAs, the situation appears to be more variegated. A proper state aid regulation is provided only in the AA with Ukraine and in the AA with Moldova. Both these AAs prohibit state aid, insofar as trade between parties is affected, and contain a definition of state aid corresponding to the definition laid down in Art. 107 TFEU, providing that the assessment of state aid by national authorities shall follow the criteria arising from EU internal practice and ECJ

³³ For example, Art. 75, para. 1, lett. c) of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ [2016] L 71, 16.3.2016, 3-321.

³⁴ Art. 75, paras. 2, 3 and 4, of the SAA with Kosovo. The SAA with North Macedonia is the only one that does not provide for the establishment of internal enforcement mechanisms, see Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, OJ [2004] L 84, 20.3.2004, 13-197.

³⁵ Art. 75, paras. 3, 4, 5 and 6, of the SAA with Kosovo.

³⁶ Art. 75, para. 9, of the SAA with Kosovo. In the case of the SAA with North Macedonia, 'appropriate measures' can be adopted if 'such practice causes or threatens to cause serious injury to the interests of the other Party or material injury to its domestic industry', Art. 69, para. 5 of the SAA with North Macedonia. See M. Cremona, *supra* note 32, 282-284.

³⁷ See D. V. Popović, 'Institutional Design of State Aid Authorities in South East Europe: The Unfit Legal Transplant and Its Ramifications', in B. Begović and D. V. Popović (eds.), *Competition Authorities in South Eastern Europe* (Dordrecht: Springer International Publishing 2018), 63-77.

³⁸ Israel, Tunisia, Morocco, Jordan. See S. Szepesi, 'Comparing EU free trade agreements Competition Policy and State Aid', European Centre for Development Policy Management InBrief No. 6E 2004, 2-3; D. Gerardin and N. Petit, 'Competition Policy and the Euro-Mediterranean Partnership', 8 *European Foreign Affairs Review* 2003, 153-180.

³⁹ For example, Art. 36 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, OJ [1998] L 97, 30.3.1998, 2-183.

⁴⁰ See L. Borlini and C. Dordi, *supra* note 19, 564-565.

case law.⁴¹ Furthermore, similarly to SAAs, these AAs contain commitments of transparency and reciprocal information. They also stipulate that the associated country shall establish an internal independent authority in charge of internal control regarding the implementation of these rules.⁴² However, unlike the other international instruments mentioned above, these AAs do not establish any specific enforcement mechanism if the parties fail to respect their reciprocal obligations in the field of state aid.⁴³ Conversely, the AA with Georgia does not deal with state aid. It establishes only transparency commitments for subsidies and follows a 'WTO plus approach': the definition of subsidy is taken from Art. 1 ASCM, but it also covers trade in services, in addition to trade in goods.⁴⁴ Therefore, the regime of subsidies in question is far less strict than the state aid prohibitions set out in the AAs with Ukraine and Moldova.

Finally, the recent Trade and Cooperation Agreement (TCA) between the EU and the UK is worthy of particular attention.⁴⁵ At first sight, the agreement seems to be inspired by the 'WTO plus approach', as it addresses subsidies control in the absence of any express reference to the EU notion of state aid or to EU internal practice in the domain of state aid.⁴⁶ However, the agreement contains a very articulated and detailed regime which, at final analysis, has substantially the same scope as EU state aid law.⁴⁷ Looking at the commitments

⁴¹ For example, Articles 262 and 264 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *OJ* [2014] L 161, 29.5.2014, 3-2137.

⁴² E.g. Arts. 263 and 267 of the AA with Ukraine.

⁴³ Generally speaking, the difference between the integration of EU law in EEA and in the AA with Ukraine is not only quantitative, but also qualitative; see M. Cremona, 'Extending the Reach of EU Law the EU as an International Legal Actor', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 98-100.

⁴⁴ Art. 206 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, *OJ* [2014], L 261, 30.8.2014, 4-743. From this perspective, the AA with Georgia is akin to the Enhanced Partnership and Cooperation Agreements concluded with Armenia and with Kazakhstan; e.g. Articles 291, para. 1, 293-294 and 297 of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, *OJ* [2018] L 23, 26.1.2018, 4-466.

⁴⁵ 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, *OJ* [2020] L 444, 31.12.2020, 14-1462. On the TCA and the territorial extension of EU rules, see, further, the chapter by Agnolucci.

⁴⁶ Title XI, Art. 3.1 of the TCA.

⁴⁷ See G. Peretz, 'The subsidy control provisions of the UK-EU trade and cooperation agreement: a framework for a new UK domestic subsidy regime', UK State Aid Law Association (30 December 2020), available at <<https://uksala.org/the-subsidy-control-provisions-of-the-uk-eu-trade-and-cooperation-agreement-a-framework-for-a-new-uk-domestic-subsidy-regime-by-george-peretz-qc/>>. On the Agreement, see S. Peers, 'Analysis 2 of the Brexit Deal: EU/UK Trade and Cooperation Agreement – Overview', *EU Law Analysis* (30 December 2020), available at <<http://eulawanalysis.blogspot.com/2020/12/analysis-2-of-brexit-deal-euuk-trade.html>>; M. Konstantinidis Mark, V. Poula, 'From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement', *European Law Blog* (14 January 2021), <<https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/>>; J. Wouters, 'The Institutional Dimension of the EU-UK Relationship After Brexit', 25 *European Foreign Affairs Review* 2020, 613-630.

enshrined in the TCA, they involve transparency duties, the establishment of an internal enforcement mechanism (at both operational and judicial level), and a cooperation procedure that can be triggered when a Party finds that a subsidy granted by the other Party had or could have a negative effect on trade or investment between the Parties. If the Parties are unable to reach an agreed solution (with the possible involvement of a Trade Specialised Committee),⁴⁸ this procedure may result in the adoption of unilateral measures, which can, in turn, be challenged through a dispute settlement mechanism (DSM).⁴⁹ Therefore, the TCA regime does not expressly incorporate EU state aid law, as in the case of the EAA, but it still establishes a very enhanced set of rules.

In conclusion, the EU has in place several agreements which can be used to regulate the issue of foreign subsidies through common and concerted rules. Nevertheless, these shared solutions basically imply a form of approximation of the legislations that ultimately consists of the export of EU state aid law. Therefore, this solution is only possible if the third country has a special relationship with the EU (for instance, when that country aspires to become a Member State, or it previously was). In other cases, the 'WTO plus approach' is the only feasible one.

3.2. EU Free Trade Agreements

The major instrument at the disposal of the EU for regulating trade relations with third partners consists of Free Trade Agreements (FTAs). The FTAs concluded or negotiated thus far by the EU never contain a fully-fledged state aid regime; rather, they deal with subsidies following the 'WTO plus approach.'

The FTA with Korea, in force since 1 July 2011, is the first FTA to embrace this approach.⁵⁰ It establishes the commitments set up in the ASCM and adds two more categories of prohibited subsidies and additional information duties.⁵¹ Then, for the first time in an EU FTA, it provides for an 'enforceable, and therefore credible, dispute settlement system with commercial sanctions.'⁵² However, this FTA does not extend the scope of the prohibitions to subsidies affecting trade in services.⁵³

Subsequent FTAs do not go much further than this. The EU-Canada Comprehensive Economic and Trade Agreement and the EU-Japan Economic

⁴⁸ Title XI, Articles 3.7, 3.8, 3.9, 3.10 and 3.11 of the TCA.

⁴⁹ Title XI, Art. 3.12 of the TCA.

⁵⁰ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2011] L 127, 14.5.2011, 6-1343.

⁵¹ Articles 11.11 and 11.12 of the FTA with the Republic of Korea.

⁵² A. Jarosz-Friis *et al.*, 'EU-Korea FTA: A stepping stone towards better subsidies' control at the international level', Competition policy newsletter 2010-1, at 78, available at <https://ec.europa.eu/competition/publications/cpn/2010_1_19.pdf>.

⁵³ Conversely, the Trade Development and Cooperation Agreement (TDCA) with South Africa, concluded in 1999, contained the broader notion of 'public aid', more similar to state aid, but the prohibition cannot be properly enforced. See S. Szepesi, *supra* note 38, at. 4.

Partnership Agreement contain very similar provisions⁵⁴ but they exclude some clauses from the scope of the DSM, namely those concerning the outcome of the consultation procedure in the case of non-compliance with the prohibition on subsidies, which is the most relevant.⁵⁵ On the other hand, the EU-Vietnam FTA (EUVFTA) and the EU-Singapore FTA (EUSFTA) cover subsidies related to trade in services and extend the scope of the DSM over the subsidies provisions, but the former contains only a prohibition 'in principle' on subsidies which remain uncovered by the ASCM regime,⁵⁶ while also requiring merely a 'best effort' commitment for a Party to eliminate the negative effect caused by a subsidy, as an outcome of the consultation procedure.⁵⁷ The EU-Singapore FTA, on the other hand, establishes an explicit prohibition on two categories of subsidies (albeit related to services),⁵⁸ thus representing an improvement compared to the other FTA, although this does not imply that the trend is about to change. In fact, the negotiated text of the new EU-Mexico FTA (not yet signed by the Parties) regulates subsidies related to services, but still excludes the matter from the scope of the DSM.⁵⁹

All in all, this brief analysis demonstrates that FTAs are a blunt instrument when used to tackle the EU foreign subsidies problem.

4. THE UNILATERAL WAY: THE COMMISSION PROPOSAL

As demonstrated in the previous section, international instruments at the disposal of the EU may only offer a partial solution to the problem, and with just a few international partners. Against this backdrop, the Commission proposes to act unilaterally, through the adoption of a regulation establishing an internal mechanism, designed to bridge the regulatory gap briefly described above. The mechanism consists of centralised control of foreign subsidies that distort the

⁵⁴ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ* [2017] L 11, 14.1.2017, 23-1079; Agreement between the European Union and Japan for an Economic Partnership, *OJ* [2018] L 330, 27.12.2018, 3-899.

⁵⁵ For example, Art. 7.9 of the CETA.

⁵⁶ 'In principle, a Party should not grant subsidies to enterprises providing goods or services if they negatively affect, or are likely to negatively affect, competition and trade', Art. 10.4 of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJ* [2020] L 186, 12.6.2020, 3-1400.

⁵⁷ Art. 10.8, para. 2, of the EU-Vietnam FTA.

⁵⁸ '(a) any legal arrangements whereby a government or any public body is responsible for covering debts or liabilities of certain undertakings without any limitation in law or in fact as to the amount of those debts and liabilities or the

duration of such responsibility; and (b) any support to insolvent or ailing undertakings in whatever form (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices, tax exemptions) without a credible restructuring plan, based on realistic assumptions, with a view to ensuring the return of the ailing undertaking to long-term viability within a reasonable time, and without the undertaking itself significantly contributing to the costs of restructuring', Art. 11.7, para. 2, of the Free Trade Agreement between the European Union and the Republic of Singapore *OJ* [2019] L 294, 14.11.2019, 3-755.

⁵⁹ See the negotiated text of the new EU-Mexico agreement, available at ><https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>>.

internal market and its functioning is based upon procedures for investigating and redressing such distortions.⁶⁰

The notion of foreign subsidy is defined in Art. 2 of the proposal. According to this definition, a foreign subsidy consists of '[...] a financial contribution [by a third country] which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several of undertakings or industries.'⁶¹ The scope of the mechanism is very wide. As explained in Art. 1, the mechanism addresses undertakings engaging in every economic activity, including undertakings '[...] acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure [...]'.⁶² As highlighted by the Commission, this notion of foreign subsidy resembles the subsidy definition established by the EU Anti-Subsidy Regulation,⁶³ which, in turn, is based on that found in the ASCM.⁶⁴ However, although their definitions appear to be similar, these notions of subsidies differ in two main elements, with regard to the scope of application. *Ratione materiae*, Regulation No. 2016/1037 and the ASCM disciplines relate only to trade in goods, while the new instruments are designed to go much further, regulating a field that has thus far not been covered. *Ratione personae*, the benefits conferred by the subsidies falling under the new instruments concern, directly or indirectly, an undertaking operating inside the EU internal market, while the subsidies legally relevant pursuant to Regulation No. 2016/1037 are granted to external undertakings or productions. In fact, in light of the above, the scope of application *ratione materiae* and *ratione personae* makes the rules on subsidies envisaged in the proposal more similar to the discipline of state aid enshrined in Article 107 TFEU, given that both aim to prevent the distortion of competition, rather than the distortion in the mere trade in goods,⁶⁵ and both apply to internal contribution recipients. As mentioned above, the main difference between foreign subsidy and state aid lies in the origin of the financial contribution, as a foreign subsidy is provided by non-EU countries by its very definition, while the notion of state aid refers only to contributions from EU Member States.

⁶⁰ Art. 1 of the Proposal for a regulation.

⁶¹ The wording of the definition could be different in the final draft of the regulation, but it is not expected to change in its substance. A very similar definition was contained in the White Paper, *supra* note 1, at 46. Foreign subsidies as such would fall under the cover of the proposed control mechanisms 'insofar as they directly or indirectly cause distortions within the internal market', *ibidem*.

⁶² Art. 1 of the Proposal for a regulation.

⁶³ Articles 3 and 4 of Regulation No. 2016/1037.

⁶⁴ Arts. 1 and 2 of ASCM.

⁶⁵ A. S. Dupont and T. Scharf, 'External Aspects of State Aid Policy – Part 1: WTO', in N. Pesaresi *et al.* (ed.), *EU Competition Law, Volume 4: State Aid* (Deventer; Leuven: Cleys and Casteels, 2016), 122-123. On the comparison between the notions of state aid, in EU law, and subsidy, in WTO law, B. Slocock, 'EC and WTO Subsidy Control Systems – Some Reflections', 6 *European State Aid Law Quarterly* 2007, 249-256; M. Slotboom, *A comparison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?* (London: Cameron May, 2006); L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford: Oxford University Press 2009), 25-87.

Looking at the functioning of the mechanism and at its governance system, a pivotal role is played by the Commission. According to the proposed regulation, the Commission is in charge of the investigation phase, i.e. the review of foreign subsidies. The Commission can carry out the review *ex officio*, while an *ex ante* notification duty concerning the existence of foreign contributions (granted in the previous three years) is established in the context of concentrations and public procurement procedures, when specific thresholds related to the EU's target turnover are met.⁶⁶ The Commission also has the power to request the prior notification of any concentration or public procurement procedure that would fall under the thresholds.⁶⁷

Any attempt to assess in more detail the governance and procedural aspects of the proposed mechanisms would probably be fruitless at the current stage of the legislative procedure, going beyond the ambit of this work. Nevertheless, it is worth noting that the investigation phase could be delicate from the perspective of the legal remedies available to the undertaking, against administrative abuses by the supervisory authority, given the difficulties in gathering the relevant information on the alleged subsidy. The mechanism established quite penetrating powers for the Commission, which can require an undertaking concerned to provide all necessary information and can even ask a third country for information.⁶⁸ The Commission can also carry out inspections on undertakings within the territory of the Member States and abroad (with the consent of that third country).⁶⁹ In the event of a lack of cooperation, if the undertaking fails to provide the necessary information, the Commission assesses the existence of the contribution, or of the related benefit, on the basis of the available facts, ultimately leading to an outcome that can be less favourable for the undertaking than if it had cooperated.⁷⁰

When the Commission identifies the existence of a foreign subsidy, it must assess if the subsidy is liable to have a negative effect on competition. Hence, foreign subsidies are not prohibited *ex se*, but only insofar as they cause a distortion, by improving the competitive position of the undertaking concerned in the internal market⁷¹ with respect to every economic activity. The distortion assessment seems to leave some margin of appreciation for the Commission, as the negative effect could even merely be potential,⁷² and, most importantly, Art. 5 leaves the Commission free to balance the negative effect with positive ones on the development of the relevant economic activity.⁷³

⁶⁶ Art. 18, paras. 3 and 4, of the Proposal for a regulation and Art. 27, para. 2, of the Proposal for a regulation.

⁶⁷ Art. 19, para. 5, of the Proposal for a regulation and Art. 28, para. 6, of the Proposal for a regulation.

⁶⁸ Art. 11 of the Proposal for a regulation.

⁶⁹ Articles 12-13 of the Proposal for a regulation.

⁷⁰ Art. 14 of the Proposal for a regulation.

⁷¹ Art. 3 of the Proposal for a regulation.

⁷² Art. 3 of the Proposal for a regulation lists a non-exhaustive series of indicators for the assessment, and states that a foreign subsidy below EUR 5 million is '*unlikely* to distort the internal market'.

⁷³ Art. 5 of the Proposal for a regulation.

After this assessment, the Commission may impose redress measures on an undertaking in order to remedy any distortion caused by a foreign subsidy. Unlike the case of internal state aid, the remedy for foreign subsidies cannot merely consist of returning the contribution to the country that granted the advantage, due to practical obstacles. This is why the Commission considers a variety of possible redress measures, alternative to reimbursement.⁷⁴ The list includes, amongst others, divestment of certain assets, refraining from certain investments, reducing capacity or market presence, or dissolution of the concentration.⁷⁵ Even at first sight, these remedies appear to be quite severe restrictions, directly affecting the investments and the very market presence of the subsidised operator. Therefore, it is hardly surprising that the feedback of non-EU stakeholders on the proposals was negative.⁷⁶

In fact, the solution to the foreign subsidies problem submitted by the Commission reveals a strong unilateral approach by the EU to dealing with the issue, which is quite a novelty in the field of EU foreign investment law and anti-subsidy policy.⁷⁷ This unilateral attitude is evidenced by the territorial extension effect which characterises the legal machinery of foreign subsidies screening, as will be seen in the next paragraph.

5. THE TERRITORIAL EXTENSION EFFECT OF EU LAW IN THE FOREIGN SUBSIDIES SCREENING MECHANISM

In the previous paragraph, we discussed the notion of foreign subsidies given in the White Paper, the scope of application of the proposed screening mechanism and the possible redress measures. Now, focusing on the circumstances that would trigger the adoption of redress measures, this analysis will aim to demonstrate how the envisaged discipline is capable of extending the reach of EU law beyond EU borders. Namely, it can be argued that the mechanism results in the territorial extension of EU law, as described by Joanne Scott.⁷⁸

The territorial extension of EU law represents the main legal tool used by the EU to extend the reach of internal law beyond the EU's territorial borders,⁷⁹ thus achieving the global reach of EU norms. Other tools are extraterritoriality and 'effect-based jurisdiction'.⁸⁰ According to the taxonomy proposed by Scott, the territorial extension of EU law depends upon the occurrence of two elements:

⁷⁴ White Paper, *supra* note 1, 19-20. As an alternative remedy, the undertaking may be able to mitigate the distortion caused through appropriate commitments, binding by a 'decision with commitments' of the supervisory authority.

⁷⁵ Art. 6 of the Proposal for a regulation.

⁷⁶ See the Summary of the responses to the public consultation on the White Paper on leveling the playing field as regards foreign subsidies, available at <https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf>.

⁷⁷ This new trend began with the FDI screening regulation, *supra*, No. 12. On the contrary, the Anti-Subsidy Regulation provides for unilateral countermeasures, but remains under the WTO law umbrella, i.e. the multilateral trade framework *par excellence*.

⁷⁸ J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', *supra* note 3.

⁷⁹ *Ivi*, at 94.

⁸⁰ *Ibid.*, 90-96.

an assessment of foreign conduct and/or third country law and a territorial connection with the EU that triggers the internal norm. The latter element distinguishes the territorial extension of law from the mere extraterritoriality of the law, where no territorial link is necessary, and from 'effect-based jurisdiction', where an internal norm applies to an external conduct due to the internal effect of that conduct.⁸¹

Looking at the Commission proposal, the first condition for the territorial extension of EU law seems to be met, although the text of the proposed regulation does not expressly address this point. In fact, in the White Paper, the Commission described three exemplary cases covered by the aforementioned definition of foreign subsidies: (i) foreign subsidies granted directly to undertakings established in the EU; (ii) foreign subsidies granted to an undertaking established in a third country where the subsidy is used by a related party established in the EU; and (iii) foreign subsidies granted to an undertaking established in a third country where the subsidy is used to facilitate an acquisition of an EU undertaking or participate in public procurement procedures. In these second and third scenarios, the conduct clearly occurs in a third country. In the first scenario, on the other hand, the extraterritorial element is not self-evident. Nevertheless, the examples of suspicious foreign subsidies illustrated by the Commission include subsidies to ailing undertakings, such as debt forgiveness, subsidies in the form of tax rebate, and subsidies in the form of unlimited government debt guarantees,⁸² which are all actions occurring abroad, insofar as these forms of subsidies are granted by non-EU countries. Moreover, even when the subsidy consists of a direct payment, the Commission proposes to consider the subsidy falling under the discipline 'from the moment the beneficiary has an entitlement to receive the subsidy'⁸³ regardless of the actual payment or the entry of that capital into the internal market. Consequently, the determination of the moment of the act (the granting of the subsidy) involves an assessment of the third country law, since the entitlement to receive the subsidy could only be determined in light of the law of the granting state.⁸⁴ Against this background, we can conclude that the proposed foreign subsidy screening discipline entails the adoption of internal measures upon the occurrence of an external action (or even external legal circumstances).

⁸¹ Ibid.

⁸² See Art. 4 of the Proposal for a regulation. White Paper, *supra* note 1, 15-16.

⁸³ Ibid., at 15.

⁸⁴ This approach is the same as that applied in the field of state aid. According to the ECJ: '[...] aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules', in ECJ, Case C-129/12, [2013] *Magdeburger Mühlenwerke*, EU:C:2013:200, para. 40. See, also, GC, Joint Cases T-624/15, T-694/15 and T-704/15, [2019] *European Food SA and Others*, EU:T:2019:423, para. 69. It is also important to consider the law of the third country for the purpose of assessing the existence of a subsidy. According to the EU Chamber of Commerce in China, 'In China, the entire system is designed with this element embedded, not only individual tax rebates or preferential loans. Any kind of intangible benefit is a form of subsidy', Targeted Consultation European Union Chamber of Commerce in China (EUCCC) – Summary 7 December 2020, available at <https://ec.europa.eu/competition/international/overview/foreign_subsidies_consultation_feedback_EUCCC.pdf>.

The occurrence of the second condition (territorial nexus) is also worthy of attention. According to Art. 3 of the proposed regulation, the screening mechanism is triggered by a distortion directly or indirectly caused by the foreign subsidy within the internal market.⁸⁵ Therefore, the ground on which the foreign subsidy would fall under the new instruments concerns the internal effects of the subsidy. The case does not seem to fall under the definition of territorial extension. The trigger of the internal norm does not appear to be a territorial nexus, but is effect-based. In fact, this kind of effect-based jurisdiction is nothing new in EU law,⁸⁶ although its legality in international public law is not without controversy.⁸⁷ Indeed, in the domain of competition law, the European Court of Justice has confirmed the legality of effect-based jurisdiction to the extent that a 'qualified effect test' is applied, according to which EU competition law may be applicable if '[...] it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.'⁸⁸ Therefore, the effect-based jurisdiction may constitute a form of what Giorgio Monti calls a 'global reach' of EU competition law,⁸⁹ also extended to the field of foreign subsidies.

However, all three cases of foreign subsidies described by the Commission entail the establishment in the EU of the subsidised undertaking or at least some conduct within the internal market. The proposed regulation is quite clear in stating that, for a foreign subsidy to exist, it must confer a benefit '[...] to undertaking engaging in an economic activity in the internal market.'⁹⁰ Thus, besides the effect-based trigger, such forms of territorial connections represent a requirement for the mechanism to be activated.⁹¹ Admittedly, it is not guaranteed that the final draft of the norm will include the exact same definition of foreign sub-

⁸⁵ White Paper, *supra* note 1, at 47.

⁸⁶ See Art. 4, para. 1, let. A), (v), and Art. 11, para. 12, of the Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories OJ [2012] L 201/1, 27.7.2012.

⁸⁷ See Scott, *supra* note 3, 92-93.

⁸⁸ ECJ, Case C-413/14 P, [2017] *Intel Corp. v European Commission*, EU:C:2017:632, para. 49. See L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules', 9 *Journal of European Competition Law & Practice* 2018, 487-495; E. N. Fox, 'Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind', 47 *Fordham International Law Journal* 2019, 981-998. See, also, AG Wahl, Case C-413/14 P, [2016] *Intel Corp. v European Commission*, EU:C:2016:788, paras. 297-304; ECJ, Case T-102/96, [1999] *Gencor Ltd v Commission of the European Communities*, EU:T:1999:65, para. 90.

⁸⁹ G. Monti, 'Global Reach of EU Competition Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), 174-196.

⁹⁰ Art. 2, par. 1 of the Proposal for a regulation.

⁹¹ In the EU Merger Regulation, the 'community dimension' of a concentration depends, amongst other conditions, on a minimum turnover within the EU. Art. 1, para. 3, of Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24, 29.1.2004, 1-22. This is an example of a territorial link, which triggers the territorial extension of EU law, without requiring the stricter condition of previous establishment. See J. Scott, *supra* note 3, 95-96. See also G. Monti, *supra* note 88, at 175; more generally, on the extraterritorial effects of competition law, F. Wagner-Von Papp, 'Competition Law and Extraterritoriality', in A. Ezrachi (ed.), *Research Handbook on International Competition Law* (Cheltenham: Edward Elgar 2012), 42-49.

sidy, but it is hard to imagine different scenarios of foreign subsidies jeopardising the internal market in the absence of any kind of territorial connection with the EU. Therefore, *de jure* or *de facto*, the second condition for the 'territorial extension' definition to apply will also probably be met.⁹²

Be that as it may, the above analysis proves that the mechanism envisaged in the White Paper is endowed with a global reach, and this exacerbates the strong unilateralism that characterises the solution proposed to tackle the foreign subsidies problem.

6. THE EU APPROACH, IN BETWEEN UNILATERAL AND SHARED SOLUTIONS

In the previous sections we have seen two different ways of tackling the problem of foreign subsidies. One possible solution is the shared one, which consists of the EU and its international partners concluding international agreements to regulate the issue. Hence, that solution implies reciprocal obligations for the EU and the third country, which must give its consent at international law level. Conversely, the other solution is unilateral, being based on the establishment of an internal legal instrument to address directly the distortion caused by foreign subsidies, regardless of the existence of international obligations on the third country concerned. At first glance, it can be assumed that the first solution would be more difficult to achieve. The second, on the other hand, seems easier to adopt. In any case, the underpinning unilateralism and territorial extension of EU law are quite onerous for the undertakings concerned⁹³ and are also intrusive for the third country, as the foreign subsidy in question is likely to correspond to a sovereign decision by the granting third country, in a sensitive political field such as industrial or fiscal national policy.⁹⁴ Is the unilateral solution the ultimate choice of the EU?

On paper, the imposing unilateralism of such a mechanism could be relieved by reaching shared solutions with international partners. The conclusion of new international agreements, such as those described above, may appear to be an alternative to the unilateralism of the screening mechanism. They are not based on the territorial extension of EU law but on international reciprocity. They

⁹² Adopting the categorisation proposed by Scott, the territorial extension of EU law in the field of foreign subsidies could be deemed to operate at firm level, see J. Scott, *supra* note 3, 26.

⁹³ The *ex ante* notification duties may lead to an increased administrative burden for the undertakings concerned. Furthermore, the proposed regulation seems to leave a broad margin of appreciation to the Commission, see *supra* p. 10-11. It may be questioned what level of judicial protection would be enjoyed by undertakings when challenging a redress measure before the ECJ. For a critical review of the ECJ's attitude in assessing the legality of existing trade defence measures adopted by the EU, see A. Willems *et al.*, 'Hurdles to Litigating Trade Defence Measures Before the EU Courts', 54 *Journal of World Trade* 2020, 919-942.

⁹⁴ These sovereign decisions of the third country must be respected as such, according to the international law principle of non-intervention. The screening mechanism does not (or should not) go so far, but it could seriously undermine the political friendship with the third country concerned. After all, the EU internal state aid regime has proven to involve challenging implications for Member States' sovereignty. See, for instance, R. H. C. Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?', in *EC Tax Review* 2016, 312-324.

are not EU unilateral instruments but are agreed between the partners. That means that they contain mutual obligations and, in the event of an infringement by one party, the other can proceed with international countermeasures (or the specific enforcement mechanisms envisaged by the agreement).⁹⁵ Insofar as these obligations cover state aid or foreign subsidies (in the broadest sense of the term), they make it unnecessary for the countries concerned to implement additional internal defensive instruments in this field.⁹⁶ However, the difficulties in negotiating and concluding international agreements containing obligations in the field of foreign subsidies, particularly those that follow the state aid approach, are among the reasons that led the EU to opt for a unilateral solution. As can be seen from Section 2, these agreements reproduce EU state aid rules (at least partially); therefore, the conclusion of such agreements entails exporting these EU legal standards abroad, by making them binding for the other parties. As noted above, this is why they only represent a viable solution with those countries that aim to have a close relationship with the EU, such as EFTA countries or its candidates and some neighbouring states (including former Member States).⁹⁷ The less close the relationship, the more difficult the negotiation of state aid rules becomes. Nevertheless, once the proposed regulation is adopted, the EU's partners may choose between accepting EU state aid rules or allowing their undertaking to face the screening mechanism. The conclusion of international agreements is one way of avoiding or limiting the unilateralism of the screening mechanism; it is therefore worth considering if this can be a real and possible alternative.

In fact, the foreign subsidies or state aid provisions contained in the international agreements examined above do not legally prevent the adoption at internal level of redress measures against private entities, such as subsidised undertakings operating in the internal market. The *ratione materiae* scope of the international obligations may even coincide with that covered by the screening mechanism (state aid approach) but the latter works at a state-to-undertaking level. On the contrary, international obligations bind the parties towards each other not to give state aid to undertakings, but leave them free to regulate access to their internal markets by third country undertakings. The same holds true even when the agreement establishes dispute settlement and enforcement mechanisms. In this case, when a partner country gives state aid to an undertaking operating within the EU internal market, the EU can choose between challenging the alleged infringement of the international obligations or acting

⁹⁵ Arguably, the countermeasures adopted in the event of a breach of the obligations by the other party cannot be considered to be based on the territorial extension of internal law. It is true that they are adopted unilaterally, upon the occurrence of misconduct by another country, but the actual trigger is not that external conduct, but the violation of international law that it represents.

⁹⁶ It has been suggested that, in the absence of the TCA, the UK would have been the first target of the screening mechanism, once established. See J. Modrall, 'EU Anti-Subsidy Initiative: Notifications, Investigations – and a No-Deal Brexit Backstop?', Kluwer Competition Law Blog (14 December 2020), available at <<http://competitionlawblog.kluwercompetitionlaw.com/2020/12/14/eu-anti-subsidy-initiative-notifications-investigations-and-a-no-deal-brex-it-backstop>>.

⁹⁷ On the integration into the internal market of this group of countries, see M. L. Öberg, 'Internal Market Acquis as a Tool in EU External Relations: From Integration to Disintegration', 47 *Legal Issues of Economic Integration* 2020, 151-178.

unilaterally within the framework of the screening mechanism.⁹⁸ This latter option is not inconsistent with international obligations and no international responsibility would be incurred by the EU.⁹⁹ In fact, the use of the screening mechanism could turn out to be more effective than international law remedies envisaged by an international agreement.¹⁰⁰ The proposed regulation does not touch upon this issue. Art. 40 merely states that the investigations and the measures of the mechanism shall be carried out and adopted in compliance with EU international obligations.¹⁰¹ Therefore, in light of the above, this clause does not prevent the prevalence of unilateral measures. Nevertheless, the EU could still choose to consider the internal measures as the last option, preferring international law remedies where available. In fact, in the White Paper, the Commission stated that, when and insofar as a subsidy is covered by both the screening mechanism and an international agreement, 'if [...] it appears more appropriate to address the distortion created by the foreign subsidy under the dispute settlement or consultation provisions of the respective trade agreement, the action under such a new instrument could be suspended.'¹⁰² In this case, internal action could be taken to impose redress measures or adopt commitments if international remedies fail to eliminate the distortion.¹⁰³

Looking at the approach followed by the EU, the answer to the foreign subsidies problem through the proposed screening mechanism seems consistent with a more assertive commercial policy by the EU,¹⁰⁴ to be developed in the context of the so-called 'open strategic autonomy' model. Open strategic autonomy means '[...] shaping the new system of global economic governance and developing mutually beneficial bilateral relations, while protecting ourselves from unfair and abusive practices.'¹⁰⁵ This approach reflects a difficult and un-

⁹⁸ This is not true in the specific case of subsidies covered by the ASCM, as Art. 32, para. 1 of the Agreement excludes the possibility of actions other than those established by WTO rules. In compliance with this clause, Regulation No. 2016/1037 shall prevail over the proposed regulation. For a critical assessment of the compliance of the proposed screening mechanism with WTO rules, see V. Crochet, M. Gustafsson *supra* note 11, 15-32.

⁹⁹ At most, one could question whether unilateral action by the EU is compatible with the principle of good faith, or whether the EU should refrain from adopting internal measures when international ones are available, in the spirit of international comity.

¹⁰⁰ The Commission lists the proposed new legal instrument among other ways to '[s]trengthen the EU's focus on implementation and enforcement of trade agreements, and ensure a level playing field', in Communication COM(2021) 66 final from the Commission of 18 February 2021, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, 19-21.

¹⁰¹ Art. 40 of the Proposal for a regulation. The provision expressly provides for the prevalence of Regulation No. 2016/1037, in compliance with WTO rules; *supra* note 10.

¹⁰² White Paper, *supra* note 1, 43-44.

¹⁰³ Although the proposed regulation does not contain such a clause, its content could be repeated in future guidelines on the function of the screening mechanism, once established.

¹⁰⁴ See Communication COM(2021) 66, *supra* note 99.

¹⁰⁵ Communication COM(2020) 456 final from the Commission of 27 May 2020, Europe's Moment: Repair and Prepare for the Next Generation, at 13. S. Anghel *et al.*, 'On the path to 'strategic autonomy'. The EU in an evolving geopolitical environment', European Parliament Think Tank 2020, available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652096/EPRS_STU\(2020\)652096_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652096/EPRS_STU(2020)652096_EN.pdf)>. Together with the proposal for a regulation, the Commission issued a communication on the new EU industrial strategy, according to which 'European companies need to benefit from a level playing field globally and in the Single Market. EU competition

settled balance between openness and closeness, unilateralism and the quest for shared solutions.¹⁰⁶ Notwithstanding the recent unilateral move, the Commission continues to reaffirm the EU's preference for international cooperation and dialogue.¹⁰⁷ In this light, the establishment of the screening mechanism may be a lever for applying pressure on international partners, instigating them to agree upon new shared solutions in multilateral forums or in bilateral contexts.¹⁰⁸ Namely, the screening mechanism could lead to the conclusion of new agreements reproducing EU state aid rules, or at least FTAs which go beyond the ASCM regime.¹⁰⁹ Moreover, it could be a strong instrument for ensuring that the existing agreements are implemented and respected by the other parties. All in all, when addressing the problem of foreign subsidies, there is still room for shared solutions but under the EU's terms.¹¹⁰ Both the unilateral and the shared solutions involve extending the reach of EU law or exporting it, thus being two sides of the same approach by the EU.

7. CONCLUSIONS

The problem represented by foreign subsidies for the internal market is evident and, in all likelihood, it will be addressed by the EU through the establishment

and trade policies have to remain assertive against unfair and coercive practices, while favouring international cooperation to solve global common problems', in Communication COM(2021) 350 final from the Commission of 5 May 2021, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, at 15

¹⁰⁶ 'Supporting multilateralism and being open for cooperation is not in contradiction with the EU being ready to act assertively in defending its interests and enforcing its rights', in COM(2021) 66, *supra* note 99, at 15.

¹⁰⁷ COM(2021) 350, *supra* note 104, at 5.

¹⁰⁸ This is recognised by the Commission itself, in the Proposal for a regulation, at 49. An indication in this sense lies in the fact that the Chinese and the US Chambers of Commerce to the EU replied to the public consultation on the need for the proposed screening mechanism, stating that, in their view, the EU should focus instead on reforming the WTO rules and on the negotiation of bilateral FTAs. Respectively available at <https://ec.europa.eu/competition/international/overview/foreign_subsidies_consultation_feedback_CCCEU.pdf> and <https://ec.europa.eu/competition/international/overview/foreign_subsidies_consultation_feedback_AmChamEU.pdf>. It is worth recalling that, pursuant to Art. 3, par. 5 TEU, the EU shall promote 'free and fair trade' in its relations with the wider world, while Art. 21, par. 1, TEU states that the EU shall promote multilateral solutions to common problems. Cf. J. Larić, 'Shaping the international order as an EU objective', in D. Kochenov, and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press 2013), 62-86.

¹⁰⁹ In a similar fashion, Schill described the recently established FDI screening mechanism as a potential 'bargaining chip' in the negotiation of trade and investment agreements, arguing that the closure of the internal market to foreign investments may lead to external investment liberalisation, see S. Schill, 'The European Union's Foreign Direct Investment Screening Paradox', *supra* note 7, 2-10. One example may be the recently negotiated CAI with China, text available at <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115>>. On the EU as a market player, see M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', 41 *Common Market Law Review* 2004, 555-558.

¹¹⁰ Quoting Bradford, '[s]ubscribing to EU rules is the price of trading with Europe', A. Bradford, *The Brussels Effect*, 107 *Northwestern University Law Review* 2012, at 66.

of the screening mechanism envisaged by the Commission.¹¹¹ As emerged in Section 3, the legal machinery underpinning that instrument is believed to be based on the territorial extension of EU law, in the meaning given by Scott. This new legal instrument appears to be necessary due to the shortcomings of other solutions, including the conclusion of international agreements able to tackle the problem adequately. The latter, however, represents an alternative to the unilateralism of the screening mechanism. Admittedly, the path towards a shared solution is not an easy one. Though it is true that international agreements may contain a foreign subsidies regime that could avoid or limit the use of unilateral instruments by the EU, this way appears to be narrow. While existing FTAs cannot offer a proper regulation of subsidies and the EEA agreement is a unicum, SAAs and some AAs involve the export of EU state aid rules to associated countries. Thus, such agreements are very difficult to conclude with countries that do not have, and do not want, a close relationship with the EU.

In any case, the assertive approach taken by the EU leaves the door open to internationally agreed solutions and may even encourage them, given that, at the end of the day, the pursuit of a shared solution involves the exportation of EU norms either way. In future, it will be interesting to see if the establishment of the screening mechanism by the EU and its strong unilateralism will lead to an increase in the negotiation and conclusion of EU agreements in the field of subsidies.

¹¹¹ The public consultation reveals that Member States and internal stakeholders generally support the Commission's proposal, *supra*, note 76.

THE EXTRATERRITORIAL EXTENSION OF EU STATE AID RULES TO THE UK THROUGH THE TRADE AND COOPERATION AGREEMENT AND THE NORTHERN IRELAND PROTOCOL: A COMPARISON WITH THE WTO SUBSIDY SYSTEM

Irene Agnolucci*

1. INTRODUCTION

The extraterritorial effect of EU law is a concept linked with the globalisation of markets, products, services and people's behaviours. The extraterritorial dimension of EU law has increasingly come to the attention of scholars and regulators to the point that many areas of EU law, such as environment, animal welfare, IP, technology and competition law, have already been investigated.¹ With regard to competition law, the literature mostly focuses on the extraterritorial consequences of merger control, abuse of dominance and cartels.² In applying policies in these areas, the EU often exercises its power to regulate and influence companies' behaviours even when they are not established in the EU.³

However, the extraterritorial dimension of EU State aid law remains largely overlooked in academic debate. The main reason is that State aid policy is aimed at protecting the internal market rather than deploying its effects beyond EU borders. EU State aid control is only capable of tackling aid involving domestic competitors. Indeed, two of the criteria on which the EU Commission assesses aid are whether national measures may have a negative effect on the internal market and whether they are capable of distorting competition between the Member States. It was only recently that the EU Commission began to look at foreign aid, i.e. aid granted by non-EU governments to companies operating in the EU. The Commission's proposal for a Regulation⁴ acknowledged, for

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¹ A. Bradford, *The Brussels Effect* (Oxford: OUP 2020); M. Cremona, J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: OUP 2019); L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?). Application of EU Competition Rules' 9 *JECLAP* (2018), at 487; V. Moreno-Lax, C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart 2014), 1657-1683; J. Scott, 'The New EU "Extraterritoriality"' 51 *Common Market Law Review* 2014, at 1343.

² Among others, see G. Monti, 'The Global Reach of EU Competition Law' in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019), pp. 174-196.

³ The phenomenon is linked to the so-called 'Brussels effect' described by A. Bradford, *supra* note 1.

⁴ Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market [2021] COM(2021) 223 final. See, in addition, the chapter by Bergamaschi.

the first time, the potential negative impact of foreign aid on the internal market. Although foreign aid will not be included in the analysis contained in this paper, the recent attention paid to this matter indicates the Commission's new approach towards a more comprehensive understanding of subsidies.

The significance of EU State aid control is multifaceted. Not only are State aid rules pivotal to the smooth functioning of the internal market, but they also play an important role in driving national budgets.⁵ It is, therefore, unsurprising that State aid policy was one of the main stumbling blocks in the Brexit negotiations. On one side, the UK wanted to retain sovereignty over the management of its spending tools and to decide which sectors to aid and which policies to support. On the other side, the Union was concerned with the UK's geographical proximity to the EU, fearing European companies would find a favourable environment for establishing their businesses in the UK while trading in the EU.

This paper aims to investigate the role of State aid control outside the European Union through the lens of the Trade and Cooperation Agreement between the EU and the UK⁶ (hereafter 'TCA'). Section II focuses on the extraterritorial effects of State aid rules, by entering into the debate around extraterritoriality and the extraterritorial extension of EU rules, including EU competition law and EU State aid. Section III will review the different systems of subsidy control, the Subsidies and Countervailing Measures Agreement under the WTO, on the one side, and the EU State aid regime, on the other side. The Section will then highlight some examples of subsidy provisions contained in trade agreements concluded by the EU with third countries.

Moreover, Section IV will examine specific provisions contained in the TCA, comparing them with the Subsidies and Countervailing Measures Agreement and EU State aid control. It will be argued that, although the language of the TCA appears to be close to the Subsidies and Countervailing Measures Agreement, it does actually draw upon EU law. A separate analysis will deal with the extension of EU State aid rules to Northern Ireland through the Northern Ireland Protocol. The paper will conclude that the architecture of EU State aid has, to some extent, been transposed into the TCA, except for some parts which reflect the provisions contained in the Subsidies and Countervailing Measures Agreement.

2. THE EFFECTS OF STATE AID LAW BEYOND EU BORDERS

Since the Treaty of Rome of 1958, State aid law has been protecting the common market by ensuring that companies and Member States can compete

⁵ A. Biondi and E. Righini, 'An Evolutionary Theory of State Aid Control', in A. Arnall, D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (OUP 2015), 670-689; A. Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' in *CYELS* 2012, 12, 35-52; L. Rubini, *The Definition of Subsidies and State Aid* (Oxford: OUP 2009), p. 40.

⁶ 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, OJ [2021] L 149, 30.4.2021, p. 10-2539.

fairly. While EU competition law precludes distortive forms of cooperation between undertakings,⁷ the EU State aid regime prevents Member States from granting economic benefits to national companies vis-à-vis their European competitors. Indeed, EU State aid control aims to avoid so-called 'deep pocket distortions',⁸ which are connected to the Member States' different financial capacities to spend on aid and invest on specific sectors or industries. The Treaty on the Functioning of the EU (hereafter 'TFEU') envisages a general ban on State aid and lays down precise criteria to be met in order for a measure to be classified as aid.⁹ For this purpose, according to Article 107(1) TFEU, aid must be granted by the State or through State resources in any form whatsoever, it must confer a selective advantage to an undertaking or a group of undertakings, and it must have an effect on trade between Member States and distort competition within the internal market. Although State aid control has been progressively contaminated by different public policy goals, the Court of Justice of the European Union (hereafter 'CJEU') has consistently held that the notion of aid is an objective one.¹⁰ Hence, the Commission should evaluate the effects of aid on the internal market rather than its policy goals.¹¹

Nevertheless, the role of EU State aid control outside the internal market is still ambiguous. Before analysing the effects of State aid control outside the EU territory, it is worth recalling the effects EU law might have beyond the Union's borders. According to Scott, the extraterritorial dimension of EU law can arise in two ways.¹² Firstly, *extraterritoriality* occurs when EU law is applied in countries other than the Member States, when there is no territorial connection between a regulated activity and a Member State in the application of a particular measure. On the contrary, the *extraterritorial extension* of EU rules requires a territorial connection with the EU but also an 'assessment of compliance with the law' to evaluate foreign conduct and/or third country law.¹³

⁷ R. Whish and D. Bailey, *Competition Law* (Oxford: OUP, 9th edition 2018).

⁸ Former Vice President of the EU Commission J. Almunia, 'Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints', speech delivered at King's College London on 11 January 2013, available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_14>.

⁹ For a comprehensive overview of the distinctive features of state aid control, see L. Hancher and J. J. Piernas López (eds.), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar 2021); P. Werner and V. Verouden, *EU State Aid Control. Law and Economics* (Alphen aan den Rijn: Wolters Kluwer 2017); H. Hofmann and C. Micheau, *State Aid Law of the European Union* (Oxford: OUP 2016); L. Rubini, *The Definition of Subsidies and State Aid* (Oxford: OUP 2009). H. W. Friederiszick *et al.*, 'European State Aid Control: An Economic Framework' in P. Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press 2008), 625-669.

¹⁰ ECJ, Case C-487/06 P, *British Aggregates Association v Commission* [2008] ECLI:EU:C:2008:757, paras. 92-93; ECJ, Case C-387/92, *Banco Exterior de España* [1994] ECLI:EU:C:1994:100; ECJ, Case C-173/73, *Italy v Commission* [1974] ECLI:EU:C:1974:71. See, also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ [2016] C 262/1, 19.7.2016.

¹¹ C. Quigley, *European State Aid Law and Policy* (Oxford: Hart, 3rd edition 2015), 15-16; T. Kleiner, 'Modernization of State Aid Policy', in E. Szyszczak (ed.), *Research Handbook on EU State Aid* (Elgar 2011), 1-27.

¹² Cremona, Scott, *supra* note 1, at 22.

¹³ Cremona, Scott, *supra* note 1, at 22.

Another significant contribution to the literature is the 'Brussels effect' theory.¹⁴ According to Bradford, the 'Brussels effect' explains how the EU is able unilaterally to regulate the global marketplace.¹⁵ Two types of 'Brussels effect' commonly take place. Firstly, corporations may respond to EU law 'by adjusting their global conduct to EU rules' (*de facto* effect). As the level of regulation is generally higher in the EU than in other regional legal systems, it is more convenient for global companies to comply with EU standards so that they are able to penetrate the vast European market. Secondly, a *de jure* effect may occur when third countries adopt 'EU-style' regulations. The *de facto* and *de jure* effects are usually linked. Indeed, the latter frequently follow the former, as multinational companies have an interest in their domestic governments adapting regulations in light of EU rules with which they already comply.¹⁶

EU competition law has substantial extraterritorial consequences on undertakings, for instance, through merger control. Indeed, as the EU is able to review mergers between companies, including foreign ones, it has the power to halt the merger when it may be detrimental to the internal market. Such a decision may produce major economic consequences for the undertakings involved. When the Commission decides to stop a merger, it also 'enjoys a *de facto* global veto over a proposed merger'.¹⁷ Indeed, if the merger is halted in the EU, the companies involved would have less of an interest in pursuing the merger elsewhere. As a result, undertakings are typically willing to comply with the Commission's requests if this means the Commission gives them the green light.¹⁸

The extraterritorial effects of EU State aid law are more blurred in comparison with those produced by other EU competition rules. This paper argues that while EU State aid law lacks extraterritoriality, it can nevertheless be extended to foreign jurisdictions when forms of territorial connection are in place. Typically, the EU takes advantage of a territorial connection to 'gain leverage over the content of third country law'.¹⁹ The extraterritorial extension may arise at three different levels.²⁰ Firstly, at its narrowest level, the extraterritorial extension is applied to individual transactions or shipments of goods that are 'centred on the territory of the EU'.²¹ Secondly, the overall assessment of compliance with EU law can be carried out within the organisation or governance of a specific firm ('firm level'). Thirdly, the provisions may be extended to the entire third country. Drawing on the latter case, the paper argues that the provisions of the TCA produce the extraterritorial extension of many EU State aid rules to the UK.

¹⁴ Bradford, *supra* note 1.

¹⁵ Bradford, *supra* note 1.

¹⁶ Bradford, *supra* note 1.

¹⁷ G. Monti, *supra* note 2, at 176; A Bradford, *supra* note 1.

¹⁸ For instance, see Commission Decision 97/816/EC of 30 July 1997 (Case No IV/M.877–Boeing/McDonnell Douglas), OJ [1997] L 336/16, 30 July 1997, paras 11–12.

¹⁹ J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: OUP 2019) at 26.

²⁰ Scott, *supra*, note 19, at 22.

²¹ Scott, *supra*, note 19, at 25.

3. TYPES OF SUBSIDY CONTROL BETWEEN STATES

a. EU State aid versus SCM Agreement

There are generally two types of subsidy systems worldwide. The first system is established by the Subsidies and Countervailing Measures Agreement (hereafter 'SCM') under the WTO. The second system is the one in place in Europe, namely the EU State aid regime enshrined in the TFEU. Several elements differentiate these two systems. Firstly, they have different goals. Indeed, the SCM is aimed at 'reconciling "mischief" protectionism with the redemption of legitimate domestic policy choices'²² so that undertakings can operate freely in international markets. Conversely, EU State aid control ensures the smooth functioning of the EU internal market by preventing distortions between EU Member States, which are thereby prevented from granting unfair economic advantages to national companies over their European competitors.

Moreover, the two systems differ in terms of semantics, enforcement, justiciability and governance. While the SCM deals with subsidies, EU law bans State aid. Although the two concepts might overlap, they entail different legal arrangements, as the degree of differentiation may extend beyond the nomenclature. Overall, EU State aid control is a more sophisticated system in comparison to the WTO architecture. Firstly, EU law establishes clear governance. As State aid control is an exclusive competence of the EU pursuant to Article 3 TFEU, the EU Commission acts as the lawmaker, regulatory body and enforcer of the rules. For instance, Article 108 TFEU requires Member States to notify measures which may be covered by Article 107 TFEU in advance ('ex-ante notification'). At the same time, Member States may not implement aid while awaiting the Commission's decision on notified aid (so-called 'standstill obligation').

Secondly, the enforcement mechanisms are quite different. While the TFEU establishes strict ex-ante control on aid by the Commission, Part V SCM provides that states may invigilate only after the issuance of subsidies by other states. As there is no centralised body in charge of assessing subsidies ex-ante, the SCM establishes a system of ex-post control, by those states which suffered damage as a consequence of the subsidy. Lastly, justiciability of EU rules is ensured by the EU judiciary system. Hence, the Commission may bring cases against unlawful aid implemented by any Member State. At the same time, competing undertakings can file cases against distortive aid before the national courts, which may eventually be brought before the CJEU. Conversely, under the WTO regime, the Appellate Body – which is in charge of receiving appeals on points of law of decisions taken by the *ad hoc* panels established by the dispute settlement body – has proven to be quite ineffective. Besides being currently blocked²³ due to the US veto on the appointment of new mem-

²² L. Rubini, *supra* note 5, at 30.

²³ B. Hoekman and P. Mavroidis, 'WTO Dispute Settlement and the Appellate Body Crisis: Back to the Future?' RSC Working Papers (2020).

bers, the number of cases heard before the Appellate Body has continuously fallen over the years.²⁴

b. Subsidy provisions in EU trade agreements

Many trade agreements concluded by the EU with third countries contain provisions on subsidies. Trade agreements are signed for many reasons, whether economic, regulatory or just to preserve political ties with foreign governments. Third countries might be willing to sign trade agreements with the EU to take advantage of the size of the internal market. The EU, on the other hand, may wish to enter into trade agreements to expand its exports, opening up to new markets and businesses. For instance, the *Trade, Development and Cooperation Agreement*²⁵ between the EU and South Africa (hereafter 'TDCA') defined as unlawful 'aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party' under Article 41.1. The TDCA also established transparency obligations, requiring aid to be granted in a fair, equitable and transparent manner. Moreover, the agreement laid down a duty to 'provide information on aid schemes, on particular individual cases of public aid, or on the total amount and the distribution of aid given'.²⁶ Nevertheless, the TDCA allowed states to grant aid if 'specific public policy objectives' were pursued. Such a clause echoed the *rationale* behind the exemptions to the EU State aid ban under the TFEU.

The new generation of trade and investment agreements concluded after the entry into force of the Lisbon Treaty, or 'free trade agreements' (hereafter 'FTAs'), usually provide a deeper level of regulation in comparison with pre-Lisbon agreements. FTAs not only establish rules on tariffs and custom duties, but they also include 'significant regulatory cooperation and investment issues that may impact citizens and local authorities more directly'.²⁷ Given that the SCM normally constitutes the baseline for drafting subsidy provisions in bilateral agreements, FTAs generally entail an enhanced level of scrutiny.²⁸ The improvement of the trade regulatory framework might be aimed at fostering

²⁴ J. Hillman, 'Three Approaches to Fixing the World Trade Organisation's Appellate Body: The Good, the Bad and the Ugly?', Institute of International Economic Law Georgetown University Law Centre (2018); E. Fabry and E. Tate, 'Saving the WTO Appellate Body or Returning to the Wild West of Trade?', J Delors Notre Europe Policy Papers No. 225 (2018); WTO, 'Améliorer les disciplines relatives aux notifications de subventions' (2017) TN/RL/GEN/188.

²⁵ Council Decision 2004/441/EC of 26 April 2004 concerning the conclusion of the Trade, Development and Cooperation Agreement between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part, OJ [2004] L 127/109, 29.4.2004.

²⁶ Article 43 of Council Decision 2004/441/EC, *supra*, note 25.

²⁷ I. Bosse-Platière and C. Rapoport, 'Negotiating and Implementing EU Free Trade Agreements in an Uncertain Environment' in I. Bosse-Platière and C. Rapoport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements* (Cheltenham: Edward Elgar 2019), at 2.

²⁸ L. Borlini and C. Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements' 23 The Columbia Journal of European Law 2017, 551-606, at 603.

protection for the playing field on which market forces operate.²⁹ Furthermore, while, at the WTO level, there is no general consensus around control of services,³⁰ provisions on services are usually included in FTAs. Lastly, trade agreements may go beyond negative control of subsidies, establishing a number of public policy objectives on the grounds of which subsidies might be cleared, for instance, regional development, R&D, services of general economic interest or equity purposes. Such objectives are already well-known among State aid experts, as they are found in Article 107 TFEU, in the Commission's practice and in the case law of the CJEU.

Numerous examples of FTAs containing subsidy provisions can be found. For instance, Article 10.4.2 Section B of the *Partnership Agreement with Vietnam*³¹ provides for an 'illustrative list of public policy objectives' under which aid could be granted. It rephrases Article 107(1) TFEU and crystallises the Commission's practice on compatible aid, while incorporating the case law of the CJEU. Indeed, under the Vietnam Agreement, subsidies can be cleared if they are aimed at repairing the damage caused by natural disasters or exceptional occurrences, promoting the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, remedying a serious disturbance in the economy of one of the Parties; facilitating the development of certain economic activities or certain economic areas, including but not limited to, subsidies for clearly defined research, development and innovation purposes, for training or for the creation of employment; for environmental purposes or in favour of small and medium-sized enterprises and for promoting culture and heritage conservation.

Another agreement whose provisions resemble typical features of EU State aid control is the *Singapore Agreement*³² signed in October 2018. Article 11.7 specifically identifies some types of prohibited subsidies, drawing on the practice of the EU Commission and the case law of the CJEU. For instance, prohibited grants are 'any support to insolvent or ailing undertakings in whatever form (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices, tax exemptions) without a credible restructuring plan, based on realistic assumptions, with a view to ensuring the return of the ailing undertaking to long-term viability within a reasonable time, and without the undertaking itself significantly contributing to the costs of restructuring'. The

²⁹ Borlini, Dordi, *supra*, note 28.

³⁰ P. Sauvé and M. Soprana, 'Learning By Not Doing: Subsidy Disciplines In Services Trade' (2015), available at <http://e15initiative.org/wpcontent/uploads/2015/04/E15_Subsidies_Sauve-and-Soprana_final.pdf>; G. Hufbauer, 'What Shapes Subsidy Disciplines in the GATT and WTO?', in L. Rubini and J. Hawkins (eds.), *What Shapes The Law? Reflections on the History, Law, Politics and Economics of International and European Subsidies Disciplines* (Florence: RSC Books 2016), 41-44.

³¹ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, OJ [2020] L 186/3, 12.6.2020.

³² Free Trade Agreement between the European Union and the Republic of Singapore, OJ [2019] L 294/3, 14.11.2019.

language used in the text of the agreement replicates the wording of the Rescue and Restructuring Guidelines³³ published by the EU Commission in 2014.

The above examples illustrate how trade agreements may extend EU State aid rules outside EU borders. According to Scott,³⁴ EU rules are extended extraterritorially when a territorial link exists – e.g. the trade agreement between the EU and the third country – and whenever an assessment of third country law or foreign conduct is required, being envisaged by those trade agreements. Nevertheless, it is still unclear whether FTAs are able effectively to promote the application of EU State aid rules.³⁵ Indeed, along with trade agreements containing EU-style provisions on subsidies, many FTAs refer to more generic provisions, drawing on the WTO regime.

For instance, the Comprehensive Economic and Trade Agreement with Canada³⁶ (hereafter ‘CETA’) defines a subsidy according to the definition given in the SCM. Moreover, the CETA only compels the parties to respect basic rules under international investment law, such as the principle of fair treatment and non-discrimination of investors. Furthermore, Canada is at liberty to adopt domestic subsidy legislation but is not obliged to do so. In terms of the remedies, the agreement with Canada contains a non-binding consultation mechanism whereby either party ‘may express its concerns to the other party and request consultations on the matter’.³⁷ Moreover, Chapter 29 sets out dispute settlement procedures to address issues that may arise from diverging interpretations and applications of the rules, including those on subsidies. Disputes should be submitted to an arbitration panel whose final report is binding on the parties.

The next section will focus on the TCA as a case study to analyse whether EU State aid rules have been extended to the UK. The TCA is the most recent example of trade agreements containing advanced subsidy provisions. The analysis of the TCA provisions will demonstrate the closer proximity to EU State aid rules in comparison with the SCM. Indeed, the EU footprint is to be found everywhere, from the definitions and the guiding principles in the application of subsidies to sector-specific rules, for instance, undertakings entrusted with services of general interest or banks, energy and aviation.³⁸

³³ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty *OJ* [2014] C 249/1, 31.7.2014.

³⁴ Scott, *supra* note 19, at 22.

³⁵ Monti, *supra* note 2, at 194.

³⁶ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ* [2017] L 11/23, 14.1.2017.

³⁷ Chapter 7, Article 7.3 of the CETA, *supra*, note 36.

³⁸ A. Biondi, ‘The New Chapter on Subsidies Regulation in the EU-UK TCA: Some First Impressions’, 20 *European State Aid Quarterly* 2021(1) 173-177, at 174.

4. SUBSIDY PROVISIONS IN THE TCA: SUBSIDY OR AID?

a. The Agreement

The TCA represents a peculiar example in international trade practice. Indeed, neither party entered into the negotiations willingly. From the EU's perspective, the Brexit referendum was a setback in the EU integration process. Thus, the traditional goals pursued through trade agreements, e.g. enhancement of export and opening up to new businesses, were replaced by the need to settle the pressing post-Brexit issues. The parties therefore struggled to reach an agreement on numerous issues, for example, the level playing field, services, border checks, fishery and Northern Ireland.

The TCA was signed as an EU-only agreement, as opposed to mixed trade agreements. While EU-only agreements are negotiated and signed by EU institutions only, mixed agreements are concluded by the Union and the Member States jointly and they require Member States' ratification in order to enter into force.³⁹ Mixed agreements are concluded when trade provisions fall within the competences of the Union and the Member States. They are underpinned by the principle of loyal cooperation between the EU and the Member States.⁴⁰ Thus, whenever a non-ratification scenario arises, the Member States and the Commission have a duty to collaborate in order to complete the ratification procedure.⁴¹ Conversely, EU-only agreements cover matters under the exclusive competence of the EU. They enter into force quicker as they do not require further steps at national level. Nevertheless, the TCA covers EU and national competences, including security, police cooperation, air travel and criminal matters. Case law of the CJEU has confirmed that deciding between mixed and EU-only agreements is not just a matter of procedural law but also has impacts on the substance of law.⁴² Notwithstanding the case law,⁴³ the leaked Council Legal Service Opinion⁴⁴ confirmed that the TCA could be adopted as an EU-

³⁹ P. Eeckhout, *EU External Relations Law* (Oxford: OUP, 2nd edition 2011), p. 212; A. Rosas, 'The European Union and Mixed Agreements' in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (London: Sweet & Maxwell 2000), at 200.

⁴⁰ For a comprehensive overview of this point, see F. Casolari, 'EU Loyalty After Lisbon: An Expectation Gap to Be Filled?' in L. S. Rossi and F. Casolari (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?* (Heidelberg: Springer 2014), 93-133.

⁴¹ G. Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' 23 *European Foreign Affairs Review* 2018, 21-40; S. Villani, 'Considerations on the judgement of the BVerfG on the conclusion of CETA' 1 *Studi Tributari Europei* 2017, 231-250.

⁴² ECJ, Case C-137/12 *Commission v Council*, [2013] ECLI:EU:C:2013:675.

⁴³ See Case C-137/12 *Commission v Council*, *supra*, note 42; see, also, ECJ, Opinion 2/15, delivered on 16.5.2017, ECLI:EU:C:2017:376.

⁴⁴ S. Peers, 'The Brexit deal – Council Legal Service Opinion', *European Law Analysis* (2021), available at <<http://eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html>>; C. Eckes and P. Leino-Sandberg, 'In view of the exceptional and unique character of the EU-UK Trade and Cooperation Agreement – an Exception to Separation of Powers within the EU?', *European Law Blog* (2021), available at <<https://europeanlawblog.eu/2021/04/15/in-view-of-the-exceptional-and-unique-character-of-the-eu-uk-trade-and-cooperation-agreement-an-exception-to-separation-of-powers-within-the-eu/>>.

only agreement under Article 217 TFEU on the grounds that it covered EU competences, whether exclusive or potential.

Chapter 3 in Title XI represents the most comprehensive body of norms on subsidies included in a trade agreement negotiated by the EU.⁴⁵ At the same time, Chapter 3 is one of the most controversial parts, as it establishes a compromise on different views on the level playing field. Indeed, the EU advocated the full application of EU State aid rules, including the ex-ante notification to the EU Commission and the CJEU's jurisdiction on disputes arising from the application of aid.⁴⁶ However, the UK demanded flexibility to establish its own national subsidy control compliant with the WTO framework but independent from the Commission's control over public investments.⁴⁷

b. The definition of subsidy

At first glance, the wording of the TCA resembles the text of the SCM. For instance, under Title XI, Chapter 3, Art. 3.1 TCA 'subsidy' is defined as 'financial assistance', in the form of 'a direct or contingent transfer of funds such as direct grants, loans or loan guarantees', or 'the forgoing of revenue that is otherwise due', or 'the provision of goods or services, or the purchase of goods or services'. Similarly, under Article 1 SCM, a subsidy is 'a financial contribution by a government or any public body', involving a direct or potential transfer of funds or liabilities, or 'revenue that is otherwise due is foregone or not collected' or the purchase of goods or provision of goods or services by the government or, 'any form of income or price support'.

However, a closer look into the semantics reveals more proximity to the TFEU. Indeed, the four criteria for a measure to be classified as a subsidy enshrined in Article 3.1(b) TCA reflect EU law. Firstly, the subsidy must arise 'from the resources of the Parties', echoing the definition given in Article 107(1) TFEU according to which aid has to be granted 'by a Member State or through State resources'. Secondly, the subsidy has to 'confer an economic advantage on one or more economic actors'. The 'economic advantage' criterion is taken from the practice of the Commission and the case law of the CJEU.⁴⁸ Conversely, Article 1.1(b) SCM only provides that the subsidy should confer 'a benefit'. It is noted that the notion of 'advantage' is broader when compared to the one of

⁴⁵ Biondi, *supra* note 38; Borlini and Dordi, *supra* note 28.

⁴⁶ For instance, Press Statement by Michel Barnier following Round 6 of the negotiations for a new partnership between the European Union and the United Kingdom, available at <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1400>; see also, Brunsden J, Fleming S, Parker G, Foster P (2020) EU Capitals Urge Barnier to Take Tougher Line with UK, at <<https://www.ft.com/content/d65e09da-bac5-4d27-bdc8-22949ce91be8>>.

⁴⁷ Statement by Lord Frost, UK Chief Negotiator, after Round 9 of the negotiations (October 2020), available at <<https://no10media.blog.gov.uk/2020/10/02/lord-frost-statement-after-round-9-of-the-negotiations/>>.

⁴⁸ ECJ, C-579/16 P, *FIH Holding*, [2018] ECLI:EU:C:2018:159; Cases T-747/15, *EDF v Commission*, [2018] ECLI:EU:T:2018:6; C-224/12 P, *Commission v Netherlands and ING Groep NV* [2014] ECLI:EU:C:2014:213; C-124/10 P, *Commission v EDF*, [2012] ECLI:EU:C:2012:318; C-480/98, *Spain v Commission* [2000] ECLI:EU:C:2000:559; C-305/89, *Italy v Commission* [1991] ECLI:EU:C:1991:142; C-303/88, *Italy v Commission* [1991] ECLI:EU:C:1991:136.

'benefit', as the latter may exclude some governmental schemes, such as loans at market conditions, which may, on the other hand, be encompassed by the TFEU.⁴⁹ Furthermore, the third criterion requires subsidies to have a direct or potential effect on trade or investments between the parties. The effect on trade is indeed one of the criteria established by Article 107(1) TFEU, while the SCM contains no specific reference to the measurement of harmful effects in trade between states.

The fourth criterion might be the least evident, but it is indeed one of the most significant. The TCA requires 'specificity', 'insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services'. Although 'specificity' is the same term used by Article 2 SCM, the way in which the criterion is described resembles the notion of 'selectivity' under EU law.⁵⁰ According to established case law, State aid is selective when it is conferred to an undertaking or to a certain group of undertakings.⁵¹ The Court has also refined its interpretation of selectivity and created a 'material selectivity test'.⁵² Measures can be designed so as to benefit a particular undertaking or a group of undertakings which operate in a specific sector or share specific characteristics of functions (*de jure* selectivity). However, measures can still be selective when they are formally applicable to all undertakings and yet they affect particular ones due to their normative formulation (*de facto* selectivity). For these reasons, although Article 3.1(b) TCA borrows the term 'specificity' from the SCM, it nevertheless refers to the concept of 'selectivity' developed by the Commission and the CJEU.

The notion of selectivity also informs the TCA's approach to taxation. Article 3.1.2 TCA clarifies that specificity has to be found when certain businesses 'are treated more advantageously than others in a comparable position within the normal taxation regime'. Similarly, according to the CJEU, the selectivity assessment should be carried out by the Commission on undertakings in 'a comparable legal and factual position'.⁵³ Furthermore, under Article 3.1.2 TCA, a normal taxation regime 'is defined by its internal objective, by its features (such as the tax base, the taxable person, the taxable event or the tax rate) and by an authority which is autonomous institutionally, procedurally, economically and financially and has the competence to design the features of the taxation regime'.

⁴⁹ L. Rubini, 'State Aid and International Trade Law', in L. Hancher and J. J. Piernas López (eds.), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar 2021), 103-133, at 109.

⁵⁰ See, for instance, ECJ, Case C-78/08 *Paint Graphos* [2011] ECLI:EU:C:2011:550; J. L. Buendía Sierra, 'Finding Selectivity or the Art of Comparison' 17 *EstAL* 2018, 85-92.

⁵¹ See, for instance, cases ECJ, Cases C-518/13, *Eventech* [2015] ECLI:EU:C:2015:9, para. 36; T-512/11, *Ryanair v Commission* [2014] ECLI:EU:T:2014:989, para. 49; C-80/08, *Paint Graphos* [2011] ECLI:EU:C:2011:550; C-88/03, *Portugal v Commission* [2006] ECLI:EU:C:2006:511; C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECLI:EU:C:2001:598; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, *OJ* [2016] C 262/1, 19.7.2016, para. 117.

⁵² C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECLI:EU:C:2001:598.

⁵³ See caselaw cited *supra* note 51.

Similarly, the CJEU, in *Azores*, held that aid could be limited ‘to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment’, so that aid has to be adopted ‘in the exercise of sufficiently autonomous powers [...] from a constitutional point of view, a political and administrative status separate from the central government’, when ‘the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government’.⁵⁴

Lastly, Article 3.1.2 TCA sets out the conditions for declaring aid not selective, i.e. subsidy ‘to fight fraud or tax evasion, administrative manageability’ or addresses ‘the avoidance of double taxation, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, or the need to respect taxpayers’ ability to pay’. The same justifications are listed in the Notice on the Notion of Aid issued by the Commission in 2016.⁵⁵

c. Guiding principles in the application of subsidies

Article 3.4 TCA – which identifies the guiding principles to be followed in the application of subsidies – highlights additional layers of proximity to EU State aid rules. For instance, under Article 3.4(a), subsidies have to ‘pursue a specific policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns’. Similarly, market failures are the main rationale for the implementation of EU State aid, such that governments may decide to use public resources in order to ease market failures, e.g. to address public goods, rent shifting and externalities.⁵⁶ Indeed, Article 107(2)(b) TFEU states that aid shall be compatible with the internal market if it has a social objective and is granted without discrimination to individual consumers or makes good the damage caused by natural disasters or exceptional occurrences. Moreover, under Article 107(3) TFEU, aid may be deemed to be compatible – upon the Commission’s assessment – when it promotes the development of certain areas and cultural and heritage conservation, or it facilitates projects of common EU interest, or it remedies a serious disturbance in the economy of a Member State, if it does not adversely affect trading conditions or the EU’s interest.

Pursuant to Article 3.4(b) TCA subsidies should be ‘proportionate and limited to what is necessary to achieve the objective’. Once again, EU law is the benchmark for measuring the application of subsidies under the TCA. Indeed, the principle of proportionality – general principle of EU law contained in Article 5(4)

⁵⁴ ECJ, Case C-88/03, *Portuguese Republic v Commission* [2006] ECLI:EU:C:2006:511, paras. 66-67.

⁵⁵ Notice on the notion of State aid, *supra* note 51, at para 139; see, also, ECJ, Cases C.374/17, *A-Brauerei* [2018] EU:C:2018:1024; C-203/16 P, *Andres (Insolvenz Heitkamp BauHold-ing) v Commission* [2018] EU:C:2018:505.

⁵⁶ Notice on the notion of State aid, *supra* note 51; on environmental goals, see ECJ, case C-233/16, *ANGED* [2018] ECLI:EU:C:2017:852.

TEU – gained paramount importance in EU State aid law after the implementation of the 2012 State Aid Modernisation Package.⁵⁷ Indeed, the proportionality test is included in many of the Commission’s guidelines. For instance, the R&D Guidelines⁵⁸ prescribe that ‘mere compliance with a set of predefined maximum and intensities is not sufficient to ensure proportionality’. Thus, the Commission is called upon to check that aid is proportionate and that it does not give undertakings any added benefit. In *Ryanair*, the General Court found that the Commission failed to detect inconsistencies in how the authorities sought to achieve the aim, in that case to avoid double-taxation for airline passengers crossing the border.⁵⁹

The guiding principles in the TCA are taken from the general principles on aid compatibility developed by the practice of the Commission when interpreting Article 107(3) TFEU.⁶⁰ Those principles are not only transplanted to the TCA, but they are also upgraded, being converted from principles declaring aid compatibility to principles reviewing the legality of subsidies.⁶¹ The upgrade can clearly be seen, for instance, in Article 3.4(f) TCA, which states that a subsidy should represent a positive contribution towards the objective pursued, so that it ‘outweighs any negative effects, on trade or investment between the Parties’. Article 3.4(f) incorporates the so-called ‘balancing test’ used by the Commission when deciding if aid is compatible with the internal market, as it looks at whether aid’s positive effects outweigh its negative effects on trade and competition.⁶²

The guiding principles will be particularly relevant when a dispute arises over the application of a subsidy. According to Article 3.12 TCA, either party may request consultation with the other party to evaluate whether any of the principles have been breached. Furthermore, pursuant to Articles 3.10 and 3.11 TCA, national courts might be called upon to evaluate whether those principles have been applied correctly by national authorities and possibly to order the recovery of unlawful subsidies. However, it is still unclear how national courts will achieve these objectives. As no *ad hoc* courts have yet been established, the Administrative Court in England and Wales and the Court of Session in Scotland would be called upon to deal with subsidy-derived litigation.⁶³ Such courts may lack the expertise required to deal with subsidies.⁶⁴ Moreover, the courts might draw their rulings from the CJEU’s interpretation of the principles

⁵⁷ The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM) Commission COM(2012)209 final; ECJ, Cases *Paint Graphos* and *Ryanair v Commission*, *supra* note 51.

⁵⁸ Framework for State Aid for Research and Development and Innovation, OJ [2014] C 198/1, 27.6.2014, para. 86.

⁵⁹ See *Ryanair* case, *supra*, note 51, at para 51.

⁶⁰ See Biondi, *supra* note 38.

⁶¹ See Biondi, *supra* note 38.

⁶² The ‘balancing test’ was first conceived by the EU Commission in 2005, see European Commission, State Aid Action Plan (SAAP): Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009, Brussels 7.6.2005, COM(2005)107 final.

⁶³ G. Peretz, ‘The UK Subsidy Control Regime: Where Is It and Where Is It Going?’ 20 *European State Aid Quarterly* 2021, 167-173, at 169.

⁶⁴ Peretz, *supra*, note 63.

of aid compatibility, with which the courts were already familiarised during the UK's membership of the EU.

d. Transparency requirements

Transparency rules under the TCA are inspired by those contained in the EU General Block Exemption Regulation⁶⁵ (hereafter 'GBER'). Once again, rules on compatible aid are used in the TCA to assess the legality of subsidies. In the GBER – which exempts certain aid from prior notification to the Commission – transparency requirements are needed to balance the leeway left to the Member States with compliance checks. Article 9 GBER compels Member States to publish information on individual awards, including the full text of aid measures, the beneficiary, amount, national authority conferring aid, policy objective and business sector, along with additional information on awards exceeding €500,000. The Commission has also implemented a *State Aid Transparency Public Search Page*⁶⁶ which identifies all national State aid awards and all relevant information to facilitate a spontaneous follow-up system at local level.

Similar transparency requirements are laid down by Article 3.7 TCA, as the Parties commit to publish information on subsidies assigned within 6 months from the granting date. This requirement can easily be respected by the EU through the above-mentioned *State Aid Transparency Public Search Page*. However, Article 3.7(5) TCA contains additional requirements to be met by the UK. Indeed, interested parties may request from the British granting authorities the full disclosure of information on aid, with the exclusion of sensitive personal data, commercial and IP clauses. The TCA establishes the right for interested parties to obtain a written response within 28 days. Therefore, any denial by the UK authorities or incomplete information would be reviewable before the national courts.

e. TCA provisions reflecting the WTO framework

Some provisions inevitably depart from the EU model, for instance, those on monitoring and dispute settlement procedures. Firstly, if either party believes a prohibited subsidy has been implemented by the counterparty, Articles 3.8 and 3.12 TCA establish a consultation mechanism similar to the one enshrined in Article 4 SCM. The latter establishes a 30-day consultation timeframe and – if no solution has then been agreed – it allows either party to refer the matter to the dispute settlement body. Under the TCA, either party can request information on how the subsidy has been implemented and on respect of the guiding principles and transparency requirements under Articles 3.4 and 3.7 TCA. However, if the party is not satisfied with the information received, it may request

⁶⁵ Commission Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ [2014] L 187/1, 26.6.2014.

⁶⁶ Available at the Commission website, <<https://webgate.ec.europa.eu/competition/transparency/public?lang=en>>.

the consultation of the *Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development*.

If the consultation procedure fails, 'the requesting Party may unilaterally take appropriate remedial measures if there is evidence that subsidies cause or may cause a significant negative effect on trade or investment between the Parties', pursuant to Article 3.12(3) TCA. Both the SCM and the TCA focus on the appropriateness of the countermeasures, as remedies should be 'commensurate with the degree and nature of the adverse effects determined to exist' according to Article 7(9) SCM and 'restricted to what is strictly necessary and proportionate in order to remedy the significant negative effect caused or to address the serious risk of such an effect' pursuant to Article 3.12(8) TCA. However, the characteristics listed in Article 3.12 TCA are also reminiscent of the principle of proportionality under EU law, which is, in turn, incorporated in Article 3.4(b) TCA.⁶⁷

As far as the dispute settlement system is concerned, Article 3.13 TCA refers to an arbitration tribunal having jurisdiction on the lawfulness and recovery of the subsidiaries, such that the tribunal has remedial powers which can be imposed on both sides. Although the TCA rules out the jurisdiction of the CJEU in principle, subsidies may, however, still be subject to the Commission's assessment and the CJEU's review in certain circumstances. For instance, Article 93 of the Withdrawal Agreement⁶⁸ enables the Commission to investigate aid for four years after the expiry of the transition period in December 2020. Furthermore, the CJEU still retains full jurisdiction on aid implemented in Northern Ireland, according to the Northern Ireland Protocol. This piece of legislation is indeed the clearest example of the extension of state aid rules.

f. The Northern Ireland Protocol

The Northern Ireland Protocol is a body of norms attached to the Withdrawal Agreement whereby the Union and the UK agreed on issues arising from the 'unique circumstances'⁶⁹ of Northern Ireland. The latter is indeed part of the UK politically and of the island of Ireland geographically. The Protocol recognises the existence of prior international commitments, such as the 1998 Good Friday Agreement,⁷⁰ and the respect of the principle of 'pacta sunt servanda' under international law. In order to avoid a hard border between the Republic of Ireland and Northern Ireland and to preserve peace, it was decided that Northern Ireland would remain in the EU internal market. Therefore, instead of establishing checks on goods at the border between the Republic of Ireland and Northern Ireland,

⁶⁷ See above Section IV, e.

⁶⁸ 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* [2019] C 384/1, 12.11.2019.

⁶⁹ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *supra*, note 68.

⁷⁰ The 'Good Friday Agreement', also known as 'The Belfast Agreement', available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>.

checks are carried out in the Northern Irish Sea between Great Britain and Northern Ireland. This arrangement was reached at the end of complex negotiations. On one side, the EU aimed to preserve political stability in the Irish region and to respect prior international agreements. On the other side, however, the UK wished to guarantee the political union between Northern Ireland and the rest of the UK.

Pursuant to Article 10 and 12 of the Protocol, Northern Ireland continues to be subject to EU law with regard to the internal market and the level playing field, EU Custom Code, EU rules on VAT in respect of goods, product standards, sanitary rules, and also EU State aid rules, including enforcement mechanisms and rules on jurisdiction. EU law will continue to apply on those matters to the whole UK territory, as long as UK measures have an actual or potential impact on trade in goods or electricity between Northern Ireland and the EU. Given that the entire Protocol has direct effect in UK law via Article 4 of the Withdrawal Agreement and Section 7A of the 2018 EU Withdrawal Act, the UK is required to abide by the Commission's control on aid and the CJEU's review.

The actual reach of the Northern Ireland Protocol for future EU-UK relationships could only be properly understood in light of two observations. Firstly, competing stakeholders will still be able to bring claims before the national courts if aid has been implemented unlawfully. Hence, the national courts have a duty to test aid against EU State aid rules and possibly to comply with the Commission's decisions and the CJEU's rulings. Secondly, the requirement that aid must have an effect on trade, in goods or electricity, whether actual or potential, might be a loose one. Indeed, the CJEU has consistently held that 'there is no threshold or percentage below which it may be considered that trade between Member States is not affected'.⁷¹ Thus, the effect on trade criterion is usually met when aid is granted to undertakings and the cross-border element is evident from their business. However, it remains to be seen whether the Commission and the CJEU will adapt the 'effect on trade' criterion to a different context.

5. CONCLUSIONS

The paper has demonstrated that EU State aid law may be extended extraterritorially to foreign countries and jurisdictions through trade agreements concluded by the EU with third countries, particularly through the most recent FTAs with Singapore, Vietnam, Japan and, most notably, the UK. The analysis of the provisions enshrined in the TCA has highlighted a significant extraterritorial extension of EU State aid rules. Notwithstanding the explicit reference in the TCA's text to WTO language – for instance, it consistently refers to subsidy rather than aid – subsidy provisions reflect EU State aid control. The text is indeed the result of opposing views on subsidy control after Brexit. Even though the TCA carefully refrains from using State aid jargon, it replicates State aid rules in many ways. Overall, while the UK will control centrally most of its aid

⁷¹ ECJ, case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECLI:EU:C2003:415.

implementation after Brexit, the TCA will still bind the UK government to respect EU-style rules. In addition, the whole EU state aid control will continue to apply when aid has an actual or potential effect on trade between Northern Ireland and the EU.

Lastly, it may be questioned whether the subsidy system envisaged in the TCA could become a new paradigm for EU trade agreements, as the TCA establishes enhanced provisions on subsidies when compared with previous trade agreements. A strict subsidy control – which mirrors EU rules rather than the SCM – ensures a higher degree of control over the level playing field. By accepting enhanced control on subsidies, the third country may secure extra accessibility to the internal market. Nevertheless, states may reject European interference over national spending. In conclusion, the extent to which the EU is able to influence the application of EU-style rules on State aid is linked to the degree of contractual power held by the EU in the negotiations. In other words, when the EU exercises its commercial strength, it is also able to impose rules which adhere more to EU standards, thus contributing to the global reach of EU law.

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