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RSCAS 2020/54
Robert Schuman Centre for Advanced Studies
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External Differentiated Integration:
Legal Feasibility and Constitutional Acceptability

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EUI Working Paper **RSCAS** 2020/54

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ISSN 1028-3625

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Published in September 2020 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy

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Abstract

The concept of external differentiated integration has received only modest attention from the legal community. As such, the concept's contours have been shaped primarily by political science. There is therefore a pressing need for a stronger legal orientation to underpin discussions of this concept. This paper seeks to construct an analytical framework for a legal exploration of external differentiation and to map its ranging landscape. In assessing the legal feasibility and constitutional acceptability of external differentiation, the paper distinguishes between external differentiation that is driven by the conclusion of an international agreement such as the EEA Agreement, and external differentiation that flows from the adoption of an internal EU act, such as the General Data Protection Regulation. Alongside the legal analysis, the importance of the paper lies in developing an analytical tool to measure the degree of 'legalization' that is inherent in international agreements giving rise to external differentiation and in the recognition that external differentiation can be achieved as a result of unilateral instruments as well as through the conclusion of international agreements.

Keywords

Third country alignment with EU law, Legalization, EU unilateralism, Extraterritoriality and Territorial Extension, Third country alignment with EU law.

Part I: Introduction*

According to the project proposal in InDivEU, external differentiated integration (external differentiation or external DI) arises when ‘EU rules are legally valid in at least one non-member state for some time’.¹ While it places the notion of legal validity at the core of the definition, it does not explain what is meant by this concept. For the purpose of our discussion of external differentiated integration, we propose to adopt a broad understanding of legal validity to include situations in which EU law is applicable in some form within one or more third countries. We explain what we mean by this below.

In our overview of external differentiation, we distinguish between external differentiation that is driven by the conclusion of an international agreement between the EU and at least one third country (Part II), and external differentiation that may be considered to be unilateral because it flows from the adoption of an internal EU act (Part III). These two forms of external DI are very different from each other. Where external DI arises as a result of an international agreement, EU law is rendered applicable in some form in the specific third countries that have concluded the agreement with the EU. By contrast, where external DI arises as a result of a unilateral EU act, EU law is rendered potentially applicable to all countries in the world. While unilateral external DI is thus ‘uniform’ in this sense, in practice, EU law will only apply to the extent that a third country or an actor within a third country has an incentive - such as gaining access to the EU’s market - to comply with EU law.

In relation to external differentiation that is achieved by way of international agreement, we present this as a legal process through which a third country is required by the terms of the agreement to adopt EU law or, more commonly, to achieve a specified degree of alignment between EU law and third country law. Although we present legal alignment as a type of external differentiation, we recognize and demonstrate that within this single category, alignment obligations take a multitude of different forms. It is important to note that an obligation for a third country to adopt EU law or to achieve legal alignment with EU law are not mutually exclusive. As will be seen, both types of obligation may be included within a single agreement.

In relation to external differentiation that is achieved by way of an internal EU act, we identify two principal forms. In the first, the EU acts unilaterally to require legal alignment between EU and third country law. We label this legal alignment unilateral external differentiation. In terms of the objective pursued, this has much in common with external differentiation that is achieved by way of an international agreement. In the second form, the EU adopts an act that establishes an obligation that pertains to conduct that takes place outside of the EU (foreign or extraterritorial conduct). In this scenario, we consider that unilateral external differentiation arises when the EU regulator is required, as a matter of law, to take foreign conduct into account when assessing whether a natural or legal person has complied with obligations laid down in EU law.² In this second kind of unilateral external differentiation, the EU’s goal is to influence the foreign conduct of natural or legal persons rather than the content of third country law. We label this conduct-related unilateral external differentiation.

* We would like to thank Marise Cremona, Bruno de Witte, Christian Frommelt and Alessandro Petti for their very helpful comments on an earlier draft. We also received helpful feedback and suggestions during the Online Mid-Term Conference for the Integrating Diversity in the European Union (InDivEU) project on 11-12 June 2020.

This paper was funded by the European Union’s Horizon 2020 research and innovation programme under grant agreement No 822304. The content of this paper represents only the views of the authors and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

¹ ‘Integrating Diversity in the European Union’ (InDivEU), p. 8

² This definition of unilateral external differentiation draws on the concept of ‘territorial extension’ developed by one of the authors of this report. See Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 *AJCL* 87.

For the purpose of this discussion, external differentiation will be considered to be unilateral when it results from the adoption of an internal EU act such as a regulation or directive.³ However, as has been widely observed, unilateralism is a spectrum concept rather than a fixed point on a scale.⁴ The degree of unilateralism inherent in a measure does not only depend on its legal form, but also on whether the objective(s) pursued by it, and the standards and enforcement mechanisms included within it, have been drawn up unilaterally or find support in instruments that have been multilaterally agreed.⁵

It will be clear on the basis of these definitions that we view external differentiation as a legal phenomenon that is closely tied to the existence of a *legal obligation* laid down in EU law. It arises when EU law requires alignment between third country and EU law; or where EU law explicitly applies to conduct taking place within a third country. Thus, the boundaries of the concept of external differentiation are determined by the content of EU law.

We do, however, include a discussion of two phenomena which operate outside the margins of external differentiation so defined. These are labelled ‘cooperation’ and ‘participation’ in the discussion of external differentiation through international agreements in Part 2 below. We include these in part because they fall within the broader understanding of external differentiation that is adopted by Work Package 6 of this project. Here, external differentiation is defined as the participation of non-EU Member States in EU policies, institutions and programmes.⁶ In addition, however, we also consider that cooperation and participation are closely related to our legal conception of external differentiation in that they often pave the way for third country alignment with EU law.⁷

Given that Work Package 2 is concerned with the legal feasibility and constitutional acceptability of differentiated integration, it is essential for us to say something about these concepts. We understand legal feasibility to include two dimensions. First, it is concerned with the compatibility of EU measures with sources of law that constrain the EU in the exercise of its competences. We do not include analysis of the legal constraints that EU Member States may face as a result of national law. Second, we also include within the ambit of legal feasibility, considerations relating to the viability of enforcing such measures. As we will see, the issue of enforcement is especially relevant when considering unilateral external differentiation. Constitutional acceptability is concerned with the compatibility of EU measures with EU constitutional norms, including the rules, principles, objectives and values laid down in the EU Treaties, the Charter of Fundamental Rights of the European Union,⁸ and in general principles of EU law.⁹

³ The legal acts of the Union are defined by Article 288 TFEU. We include those that are binding within the scope of this chapter, namely regulations, directives and decisions. However, we exclude decisions concluding an international agreement in accordance with Article 218 TFEU. Such decisions are inextricably tied to international agreements of the kind that were discussed in Part II of this report.

⁴ Daniel Bodansky, ‘What’s so bad about unilateral action to protect the environment?’ (2000) 11 *European Journal of International Law* 339.

⁵ This is in accordance with the spectrum developed by Bodansky, *ibid.* He places national measures enforcing international law norms in the manner contemplated or authorized by international law at the least extreme end of the unilateralism spectrum. At the most extreme end are measures which are not only unilateral in form but unilateral also in terms of the objective pursued and the rules and standards included in the measure.

⁶ InDivEU, above n.1, p. 36.

⁷ For example, the DCFTAs with Georgia and Ukraine contain detailed sectoral cooperation clauses that make explicit reference to EU law and thereby set a course towards future alignment. For further detail, see section Part II, Section 3.5.

⁸ Article 6(1) TEU.

⁹ The CJEU has characterized the EU Treaties as the EU’s constitutional charter since Case 294/83, *Parti écologiste Les Verts v. European Parliament*, para. 23, ECLI:EU:C:1986:16. The CJEU has also recognized that general principles of law have constitutional status; see e.g. Case C-101/08, *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Other*, para. 63, ECLI:EU:C:2009:626.

There is a clear overlap between legal feasibility and constitutional acceptability in so far as the sources of law that constrain the EU in the exercise of its powers may be considered to be constitutional norms. Therefore, our discussion of legal feasibility is also often a discussion about constitutional acceptability. However, in relation to unilateral external differentiation, we include a separate discussion of the constitutionalisation of EU external relations, when we consider the nature and role of the sources of normativity included in Articles 3(5) and 21 TEU. First, though, we proceed with the discussion of external differentiation that occurs as a result of an international agreement (Part II below).

Part II: International agreements

1. Introduction

The concept of external DI has received only modest attention from the legal community. As such, the concept's contours have been shaped primarily by political science. There is therefore a pressing need for a stronger legal orientation to discussions of external DI. In remedying this situation, the aims of this section are twofold. First, to construct an analytical framework for the legal examination of external DI and thereafter map its ranging landscape. Sections 2 and 3 of this part address this aim. Here, the focus is external DI that arises where a third country enters into a binding agreement with the EU, to adopt or align its laws with those of the EU, either to a greater or lesser degree. To this end, it will focus on external DI that is facilitated through EU international agreements. The second aim, addressed in Section 4, is to identify the legal constraints that may restrict the advancement of external DI by way of international agreement. In this regard, Part II identifies how both EU law, including EU constitutional law, as well as international law can constrain external DI. Thereafter, Section 5 draws preliminary conclusions on the continued legal feasibility of external DI.

2. Analytical framework for the assessment of external DI

To map the different international agreements of the EU, it is necessary to identify suitable parameters around which to do so. In constructing such a framework, the work of Abbott et al. in their seminal article 'The Concept of Legalization' is highly instructive. Their intention was to develop a lens through which the strength of international legal obligations could be assessed.¹⁰ An important distinction is drawn between 'law' and 'legalization'. The former refers to the legal system and the body of legal rules, procedures, discourses, and institutions existing at a point in time. It is the static nature of things as they stand. In contrast, 'legalization' refers to the process of adding to, changing, or subtracting from the body of law and the legal system over time.¹¹ This latter describes the dynamic process through which law changes over time.

Abbott et al. suggest the process of legalization has three dimensions: (a) *obligation*: states or other actors are bound by a rule or commitment or by a set of rules or commitments; (b) *precision*: rules unambiguously define the conduct they require, authorize, or proscribe; and (c) *delegation*: third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.¹² Alternative frameworks have been also been developed elsewhere.¹³ Rather than represent binary categories, each dimension should be thought of as a continuum that ranges between weak and strong ideal types.

Table 1 below illustrates the alternative ranges of each dimension.

¹⁰ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, 'The Concept of Legalization', (2000) 54(3) *International Organization* 201.

¹¹ Kenneth W. Abbott, Duncan Snidal, 'Hard and Soft Law in International Governance', (2000) 54(3) *International Organization* 421.

¹² Abbott et al., above n 10, 401.

¹³ See generally: Sebastian Oberthür, 'Hard or Soft Governance? The EU's Climate and Energy Framework for 2030', (2019) 7(1) *Politics and Governance* 17; Sebastian Oberthür and Ralph Bodle, 'Legal Form and Nature of the Paris Outcome', (2016) 6 *Climate Law* (40); Kalimo, Harri and Staal, Tim, "'Softness" in International Instruments: The Case of Transnational Corporations", (2015) 42(2) *Syracuse Journal of International Law and Commerce*: 387; Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', (2010) 94 *Minnesota Law Review* 706; David Trubek and Louise Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', (2005) 11(3) *European Law Journal* 343.

While a focus on the language is instructive in assessing the strength of single international legal obligations, for external DI, it is not sufficient. In examining external DI, a crucial element is the scope of the *acquis* that is to be adopted or aligned with. As identified by Stubb, ‘matter’, defined as the relevant policy area of the *acquis*, is an important variable of differentiated integration.¹⁶ To this extent, and in contrast to Abbott et al., the assessment of obligation can be expanded to include its ‘scope’. For our purposes, scope is taken to refer to the extent to which a third country is required to adopt or align with the *acquis*. The maximum is adoption or alignment with the entirety of the *acquis*. At the other end of the spectrum, there is obligation to adopt or align with none of the *acquis*. The two variables and their accompanying indicators, strength and scope, are outlined displayed in Table 2 below. It is submitted that this tailored version of Abbott et al.’s dimension of obligation is better suited to the process of external DI.

Table 2. Indicators of obligation



<i>a. Strength</i>		
<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;">High</div> <div style="flex-grow: 1; border-left: 1px solid black; border-right: 1px solid black; position: relative;"> <div style="position: absolute; top: -10px; left: 50%; transform: translate(-50%, -100%);">↑</div> <div style="position: absolute; bottom: -10px; left: 50%; transform: translate(-50%, 100%);">↓</div> </div> </div>	Unconditional legal obligation	<i>Absolute</i>
	Obligation subject specified reservations	<i>Hard</i>
	Conditional obligation	<i>Partial</i>
	Horatory obligation	<i>Soft</i>
	No obligation	<i>Absence</i>
Low		
<i>b. Scope</i>		
<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;">High</div> <div style="flex-grow: 1; border-left: 1px solid black; border-right: 1px solid black; position: relative;"> <div style="position: absolute; top: -10px; left: 50%; transform: translate(-50%, -100%);">↑</div> <div style="position: absolute; bottom: -10px; left: 50%; transform: translate(-50%, 100%);">↓</div> </div> </div>	Entirety of <i>acquis</i>	<i>Absolute</i>
	Substantial portion of <i>acquis</i> (two or more policy areas)	<i>Hard</i>
	Single policy area of <i>acquis</i> (e.g. EU competition law)	<i>Partial</i>
	Single rule of <i>acquis</i> (e.g. Technical standards)	<i>Soft</i>
	None of <i>acquis</i>	<i>Absence</i>
Low		

¹⁶ Alexander Stubb, ‘A Categorization of Differentiated Integration’, (1996) 34(2) *Journal of Common Market Studies* 283.

2.2 Precision (substance + time)

Abbott et al. describe a precise rule as one that ‘specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it)...[accordingly] precision narrows the scope for reasonable interpretation.’¹⁷ An important distinction is drawn between rules and standards. Rules (‘do not drive fast than 50 miles per hour’) are more precise than standards (‘do not drive recklessly’) which require further interpretation to have meaningful effect. For the examination of external DI, precision provides a useful yardstick. Notably, the precision of external DI legal obligations is a parameter that has not been examined in previous literature. Again, this dimension is modified for the purpose examining external DI. To this end, the precision of external DI obligations can be assessed across two axes, namely, substance and time. ‘Substance’ refers to the extent to which an external DI obligation specifies what is to be adopted by a third country. In contrast, ‘time’ signifies whether the external DI obligation specifies a timeline for adoption/alignment with the acquis. The variable of this modifies dimension are displayed in Table 3 below.

Table 3. Indicators of precision



<i>c. Substance</i>		
High  ↓	Replication of EU law	<i>Absolute</i>
	Clear specification of existing piece of EU law	<i>Hard</i>
	Reference to particular policy area of acquis	<i>Partial</i>
	Broad reference to acquis but scope undefined	<i>Soft</i>
	No specification	<i>Absence</i>
Low		
<i>d. Time</i>		
High  ↓	Direct adoption with continued alignment	<i>Absolute</i>
	Alignment on specified future date	<i>Hard</i>
	Alignment on unspecified future date	<i>Partial</i>
	Cooperation with view to alignment	<i>Soft</i>
	No specification	<i>Absence</i>
Low		

¹⁷ Abbott et al., above n 10, 412.

2.3 Delegation (Implementation + enforcement)

The final element of legalization referred to by Abbott et al. is delegation. What is meant by delegation is the extent to which states and other actors delegate the implementation and interpretation of an agreement to third parties, namely: courts, arbitrators, and administrative organisations.¹⁸ For the purpose of mapping the EU's international agreements, two dimensions of delegation are identified, as is done by Abbott et al., which are surveillance and enforcement. For our purposes, 'surveillance' refers to the extent to which an independent body is empowered to monitor a third country's alignment with the *acquis*. Various arrangements can be identified across the EU's international agreements. Enforcement relates to the extent that an independent body can issue binding interpretations of the subject matter of adoption or alignment. A particularly important aspect of this is whether CJEU is empowered to issue binding interpretations of EU law. The spectrum of indicators for both are displayed in Table 4 below.

Table 4. Indicators of delegation

<i>e. Surveillance</i>		
High  Low	Supervision by EU institutions	<i>Absolute</i>
	Supervision by independent body	<i>Hard</i>
	Coordinated implementation by independent body	<i>Partial</i>
	Diplomatic negotiation by contracting parties	<i>Soft</i>
	No supervision	<i>Absence</i>
<i>f. Enforcement</i>		
High  Low	CJEU enforcement	<i>Absolute</i>
	Resolution by standing independent body with referral to CJEU	<i>Hard</i>
	Ad hoc resolution through arbitration	<i>Partial</i>
	Resolution through diplomatic negotiation	<i>Soft</i>
	No delegation	<i>Absence</i>

¹⁸ Abbott et al., above n 10, 415.

2.4 Mapping external DI

The following section will examine five external DI mechanisms, namely: direct adoption, homogeneity, equivalence, approximation, cooperation and participation.¹⁹ While each mechanism is described in greater detail below, it is necessary to define what is meant by ‘mechanism’. In this context, the term refers to the legal process through which a third country is required to either adopt or align with an internal EU law. A focus on mechanisms, rather than individual EU international agreements, which has been the common in previous approaches to this topic, is preferred for a straightforward reason: the aim is to provide an overview of the legal framework of external DI. EU international agreements do not subscribe to a single mechanism, normally they mix and match depending on their aims. Thus, to provide an accurate overview, it is preferable to focus on the mechanisms of external DI. It is argued that the complexities of this process, found in the separate mechanisms, can be adequately captured by reference to the discussed threefold criteria of obligation, precision and delegation.

Table 5 below outlines the agreements to which we apply our analytical framework. As outlined in the project proposal, we have included arrangements related to the UK’s withdrawal from the EU (both the Withdrawal Agreement and Political Declaration) together with the EU’s agreements with the Western Balkan states, among others. These are examined when relevant to one of the external DI mechanism identified above. While remaining committed to an examination focused on legal mechanisms, for the sake of completeness, in Annex I to this report, we have provided an additional table that demonstrates the primary mechanism associated with each category of agreement, the ‘centre of gravity’, listed in the table in the Annex below.

Table 5. Overview of EU international agreements

<i>Type of agreement</i>	<i>Name of agreement</i>	<i>Non-member states</i>
Multilateral	European Common Aviation Area	Albania, Algeria, Bosnia and Herzegovina, Georgia, Jordan, Iceland, Israel, Kosovo, Lebanon, North Macedonia, Moldova Montenegro, Morocco, Norway, Serbia and Tunisia
	Energy Community Treaty	Albania, Armenia, Bosnia and Herzegovina, Georgia, Kosovo, North Macedonia, Moldova, Montenegro, Serbia, Turkey, Ukraine
	European Economic Area	Norway, Iceland and Lichtenstein
Bilateral	Swiss Sectoral Agreements	Switzerland

¹⁹ It is noted here that many of these mechanisms were previously identified in Roman Petrov, ‘Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries’, (2008) 13 *European Foreign Affairs Review* 33.

	EU-UK Withdrawal Agreement	United Kingdom
	Ankara Agreement	Turkey
	AAs with Deep and Comprehensive Free Trade Area	Ukraine, Georgia, Moldova
	Stabilisation and Association Agreements (Western Balkans)	Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Kosovo
	Euro-Med Association Agreements	Tunisia, Morocco
	Enhanced PCAs	Armenia, Kazakhstan
	PCAs	Russia, Azerbaijan
Institutional	Participation in EU agencies	Albania, Belarus, Georgia, Nigeria, Switzerland, Turkey,
	Participation in EU programmes (Horizon 2020)	Israel, Faroe Islands, Switzerland

3. Mechanisms of external DI

3.1 Direct adoption

Direct adoption of secondary law

Direct adoption is the mechanism through which an internal EU law becomes legally valid in a third country's legal system. Consequently, EU law becomes both invocable before and enforceable by the domestic courts of a third country. While transposition of individual EU laws will often be required, the defining characteristic of this mechanism is that it requires the domestic incorporation of EU law into the legal order of a non-member states.²⁰ Three examples of direct adoption are found in the European

²⁰ Whether transposition is required is sometimes debated. For instance, a minority of EEA scholars argue that European Economic Agreement, Article 7, implies the direct effect of Regulations; see Tarjei Bekkedal, 'Understanding the nature of the EEA Agreement: On the direct applicability of regulations', (2020) 57 *Common Market Law Review* 773. Alternatively, others consider that there is a need for transposition of relevant EU laws: Haukeland Fredriksen and Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on', (2015) 53 *Common Market Law Review* 629.

Common Aviation Area ('ECAA')²¹, European Economic Area ('EEA')²², and EU-UK Withdrawal Agreement ('EU-UK WA').²³ Both the ECAA and EEA impose almost identical obligations on their contracting parties worded as follows²⁴:

Acts referred to or contained [in the Annex(es) of ECAA or EEA] or in decisions of [relevant the Joint Committee] shall be **binding** upon the Contracting Parties and be, or be made, part of their **internal legal order** as follows:

- (a) an act corresponding to a European Community Regulation shall be made part of the internal legal order of the Contracting Parties;
- (b) an act corresponding to a European Community Directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

With reference to our terms of assessment, the Articles can be described as both unconditional and precise. Use of the wording 'shall be binding' together with 'be, or be made, part of their internal legal order' imposes a clear and unambiguous obligation on the contracting parties. Further, the internal legal effect of the relevant internal EU law is established clearly.²⁵ In this regard, the ECAA confirms that rights deriving from the ECAA are to be made domestically enforceable and that no domestic legislation is to be adopted unless in accordance with its provisions.²⁶

The breadth of the obligations with reference to the *acquis* does differ, which reflects the differing aims of the two agreements. The ECAA establishes a single market in aviation services and its scope extends only to air transport and to the associated matters mentioned in Annex I.²⁷ Annex I covers primarily aviation matters, such as air traffic management, aviation security and safety, and consumer protection. For each listed EU regulation and directive, Annex I specifies the provisions of EU law that are to be applied by non-EU contracting parties. In contrast, the EEA seeks to apply the four freedoms of the single market to the EFTA states. There are 49 Protocols and 22 Annexes to the EEA that outline what EU law is to be directly adopted by the EFTA states.²⁸ Its obligation is therefore of a much broader scope than that of the ECAA.

An alternative version of the obligation to directly adopt is found in the EU-UK WA, whose purpose is to provide for an orderly withdrawal of the UK from the EU. The Agreement establishes a 'transition period' (from 31 January 2020 to 31 December 2020) during which the permanent future EU-UK relationship is to be negotiated.²⁹ Throughout the transition period, Article 127(1) requires that 'Union law shall be applicable to and in the United Kingdom.' The effect of Union law in the UK is well-defined by paragraph (3) of Article 127:

²¹ Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, [2006] OJ L/285 ('ECAA').

²² Agreement on the European Economic Area, [1994] OJ L/001 ('EEA'), Article 1(2).

²³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018 ('EU-UK WA').

²⁴ ECAA, Article 3; EEA, Article 7.

²⁵ It is important to note that not all of Annex I of the ECAA is to be directly adopted. An important caveat is Annex IV, which contains a number of Protocols for certain contracting parties, such as Albania. The Protocols stagger the timeline for the adoption of the legislation found in Annex I across two transitional periods.

²⁶ ECAA, Articles 15(1) and 17(1).

²⁷ ECAA, Article 3(2).

²⁸ EEA Agreement, L 1/37 onwards.

²⁹ EU-UK WA, Article 126.

During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom **the same legal effects as those which it produces within the Union and its Member States**, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.

Article 4 contains the same obligation and adds:

1. ...Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

Technically, the UK is not adopting EU law but rather maintaining, for the duration of transition period, the previous role played by EU law within its domestic legal system. Nevertheless, the situation also is an example of a third country agreeing, by way of an international agreement, to apply EU law domestically. As was the case with previous examples, the obligation's language is unconditional ('shall be applicable'/'shall produce'). The scope of UK's obligation is conditioned by the definition of 'Union law', which includes primary and secondary EU law as well as EU international agreements.³⁰ When compared to the ECAA and EEA obligation discussed above, this is clearly broader in terms of its coverage of the *acquis*.³¹

The ECAA and EU-UK WA agreements each establish independent bodies (known as Joint Committees) to supervise compliance by the contracting parties with the incorporated EU law.³² Decisions by either Joint Committee are legally-binding.³³ The Committees themselves are to be made up representatives of either Contracting Party, which renders both bodies diplomatic forums.³⁴ For the EU-UK WA, during the transition period, both the CJEU and EU Commission maintain their previous supervisory roles.³⁵ While the institutional setup of the EEA is slightly more complicated, which the following subsection discusses in greater detail, the supervision of the EFTA states adherence with their EEA obligations is undertaken by the EFTA Surveillance Authority ('ESA').³⁶ The role of the ESA mirrors that of the European Commission and these two institutions collaborate closely in their tasks. ESA is able to impose enforceable pecuniary awards for breaches of the EEA.³⁷ Crucially, in contrast to the previously discussed Joint Committees, the ESA operates independently of the EFTA states and permanently based in Brussels with a staff of approximately 70. Consequently, it can be viewed as representing a stronger form of supervision as it is permanently established body as opposed to an ad-hoc Joint Committees.

The enforcement of directly adopted EU law varies considerably in each agreement. In the ECAA, the role of enforcement is delegated to the Joint Committee which has four months to resolve the matter.³⁸ Importantly, decisions by the Joint Committee must respect the case law of the CJEU. If it fails

³⁰ EU-UK WA, Article 2(a).

³¹ There are narrow exceptions to this scope, see EU-UK WA, Article 129(1)(a)-(b).

³² ECAA, Article 18(1); EU-UK WA, Articles 164(1) and (4).

³³ ECAA, Article 19(1); EU-UK WA, Article 166(2).

³⁴ ECAA, Article 18(2); EU-UK WA, Article 164(1). Exemplifying this is the fact that the UK is represented by Chancellor of the Duchy of Lancaster, currently Michael Gove, at meetings of the EU-UK WA Joint Committee, see: <https://www.gov.uk/government/publications/factsheet-withdrawal-agreement-joint-committee>. Accessed 30 April 2020.

³⁵ EU-UK WA, Article 131.

³⁶ EEA, Articles 108(1) and 109(1).

³⁷ EEA, Article 109(2) and 110.

³⁸ ECAA, Article 20.

to do so, the parties to the dispute can refer the matter to CJEU for resolution. For the EEA, again, things are slightly more complicated. Disputes concerning decisions of the ESA or conflicts between EFTA states are to be resolved by an independent court known as the EFTA Court.³⁹ However, disputes concerning the interpretation of the EEA itself are to be resolved by a Joint Committee, a diplomatic body, composed of representatives of the contracting parties.⁴⁰ In a similar fashion to the ECAA, contracting parties have the option, where the dispute concerns EEA provisions identical to EU law, to request a ruling from the CJEU. Under the EU-UK WA, the settlement of disputes during the transition period is responsibility of the CJEU. Thereafter, enforcement is delegated to an independent arbitration panel.⁴¹ However, should a dispute concern the interpretation of Union law, as defined above, then the arbitration panel must request a ruling from the CJEU.⁴²

At first glance, it would appear that each agreement operates a similar form of enforcement in relation to the interpretation of EU law. A diplomatic body, the Joint Committees, attempts to resolve the disputes with option/obligation of referral to CJEU. There are, however, some important differences. First, the decision-making process of each of the Joint Committee differs; ECAA by unanimity (meaning all parties must agree), EEA by consensus (meaning a majority must agree) and EU-UK by mutual consent. Second, perhaps more importantly, is the effect of referral to the CJEU. Under the ECAA, decisions by the CJEU are to be final and binding.⁴³ This is not the case for the other two agreements. While the EEA makes clear that the Joint Committee should closely follow the case law of the CJEU, which the following section discusses further, it does not make such a ruling binding.⁴⁴ Moreover, under the EU-UK WA, referrals to the CJEU are to be remitted back to the established arbitration panel which then proceeds to resolve the dispute in light of the given judgment of the CJEU.⁴⁵

The analysis of this mechanism 1 (direct adoption) can be mapped as follows:

Agreement	Obligation		Precision		Delegation	
	Strength	Scope	Substance	Time	Surveillance	Enforcement
ECAA	Absolute	Partial	Hard	Hard	Partial	Hard
EEA	Absolute	Hard	Hard	Hard	Hard	Hard
EU-UK WA	Absolute	Absolute	Absolute	Absolute	Absolute	Absolute

There are three important themes to pull out of the above mapping: (1) direct adoption ranks as a strong obligation for third countries to adopt EU law which has been used to export parts of the *acquis*; (2) it is a precise mechanism, both in terms of the EU law to be adopted and the timeframe for adoption; and, (3) the surveillance and enforcement obligations used are less consistent with a variety of arrangements identified above.

³⁹ EEA, Article 108(2).

⁴⁰ EEA, Article 111.

⁴¹ EU-UK WA, Article 170. It is only recently that the EU has begun to enforce the terms of its international agreements using state-state arbitration, see: <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>.

⁴² EU-UK WA, Article 174.

⁴³ ECAA, Article 20(3).

⁴⁴ EEA, Article 105(2).

⁴⁵ EEA, Article 174(3)-(4).

3.2 Homogeneity

Homogeneity, as a concept, implies a high degree of alignment. It is typically considered to refer to the uniform application and interpretation of the *acquis*.⁴⁶ Before examining the EU's various arrangements for homogeneity, it is worth distinguishing this mechanism from direct adoption as discussed in the previous section. Direct adoption can be described as a static mechanism; it refers to the process through which a third country immediately adopts EU law into its internal legal order. Direct adoption does not impose an obligation on a third country to ensure that the adopted law remains in alignment with future EU law. In contrast, homogeneity is a dynamic mechanism that facilitates continued alignment with EU law after its initial adoption. It is often paired with direct adoption meaning that the two work in tandem (as in the EEA example). As observed elsewhere, homogeneity may encompass two forms of obligation: (a) *legislative* - a third country is bound by EU new legislation falling within the scope of the relevant agreement; (b) *interpretative* - a third country must ensure that 'imported' EU law continues to be interpreted in accordance with EU law as it develops.⁴⁷ The EU's use of each of these obligations is discussed below.

Legislative homogeneity

Various versions of the obligation to ensure continued alignment with EU law (legislative homogeneity) can be identified. A highly developed example, and perhaps the most famous, is found in the EEA that provides:

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties...with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.⁴⁸

Thereafter, in a subsequent article, it states:

In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement.⁴⁹

Two points should be highlighted here. The first is an expressed intention to create a homogenous economic area. This is found in the very first article of the EEA (as well as its preamble). Second, the responsibility for homogeneity falls to the EEA Joint Committee. This is achieved by the Joint Committee amending one of its Annexes to incorporate new Community legislation. As discussed above, once an EU act is listed in an Annex, the EFTA states have an unconditional legal obligation to incorporate it into their internal legal order. The obligation of legislative homogeneity extends across the EEA's 22 Annexes that relate to different parts of the internal market. The obligation imposed is precise as the relevant EU law will be specified in the Annexes, which should be updated shortly after internal EU law is adopted so as to achieve the goal of *simultaneous application*. In this regard, the EEA states that the 'Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.'⁵⁰

⁴⁶ Adam Łazowski, 'Flexibility and homogeneity: two uneasy bedfellows', in Steven Blockmans (ed), *Differentiated Integration in the EU: From the Inside Looking Out* (Brussels: CEPS, 2014), 37–45.

⁴⁷ *Ibid.*, 40. See also: Sieglinde Gstöhl, 'Models of external differentiated in the EU's neighbourhood: an expanding economic community?', (2015) 22 *Journal of European Public Policy* 854, 857; Roman Petrov, *Exporting the Acquis Communautaire Through European Union External Agreements* (Nomos, 2011) 95.

⁴⁸ EEA, Article 1(1).

⁴⁹ EEA, Article 102(1).

⁵⁰ *Ibid.*

There is a strong obligation of alignment. With regard to delegation, the comments of Section 3.1 above apply.⁵¹

To date, the ECAA is the only other agreement to explicitly acknowledge homogeneity as a goal.⁵² Like the EEA, its Joint Committee is empowered to amend Annex I as necessary which, in turn, places a binding legal obligation on its contracting parties to incorporate the specified EU law domestically.⁵³ However, as noted above, the ECAA is of much narrower scope than the EEA. Its precision is of a high degree. That said, in contrast to the EEA, it does not specify how quickly alignment should be achieved with new EU law. Again, the previous findings of Section 3.1 in relation to delegation of the ECAA's obligation of Section 3.1 apply here.

While not explicitly referencing homogeneity, further examples can be identified. The EU-UK WA adopts both a general and specific approach. As explained in the previous section, the UK's obligations, now as a third country, are anchored around the definition of 'Union law'. Close examination of this term reveals it is of a dynamic, as opposed to static, nature, meaning it does not prevent post-signature legislation from falling within its scope. This is confirmed by Article 6(1) that reads 'Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period.' Separately, Article 36(1) empowers its Joint Committee to amend Part II of Annex I, 'to align it to any act amending or replacing Regulations (EC) No 883/2004 and (EC) No 987/2009 as soon as such act is adopted by the Union.' To this end, the EU is to inform the United Kingdom within the Joint Committee of any act amending or replacing those Regulations. Clearly, there is a degree of dynamism here.

In other areas, the EU-UK WA also provides for the continued alignment, albeit in highly specialised contexts. The first, certainly most controversial, example is the Northern Ireland Protocol.⁵⁴ The purpose of the Protocol is to prevent the creation of a hard border between Ireland and Northern Ireland. The effect of the Protocol is Northern Ireland will remain formally within the UK customs territory, while at the same time will be treated *de facto* as part of the Union's customs zone, and subject to a various portions of internal market regulation.⁵⁵ This includes technical regulations for goods, agricultural, environmental production and regulation, and state aid.⁵⁶ In these areas, Northern Ireland will need to keep pace with new EU law developments. The Protocol will come into effect at the end of the transition period, with the implementation and enforcement of remaining EU law being monitored by the Commission and CJEU.⁵⁷

The second example is citizens' rights. The EU-UK WA, for certain categories of Union and UK citizens,⁵⁸ provides a specified group of rights and protections, including the right to continue residing in the host State and the possibility of acquiring permanent residence based on continuous lawful residence.⁵⁹ The exercise of both rights is made subject to applicable EU law and therefore represents an example of continued alignment. Finally, the Political Declaration that accompanies the EU-UK WA contains a new innovation in the form of level-playing provisions. In theory, these commit the EU and

⁵¹ EEA, Article 93(1)-(2).

⁵² ECAA, Article 16(3).

⁵³ ECAA, Articles 3(1) and 18(1)

⁵⁴ EU-UK WA, Protocol on Ireland/Northern Ireland.

⁵⁵ For a much more detailed explanation, see Michael Dougan, 'So Long, Farewell, Auf Wiedersehenn, Goodbye: The UK's Withdrawal Package', (2020) 57 *Common Market Law Review* 631, 679-688.

⁵⁶ EU-UK WA, Protocol on Ireland/Northern Ireland, Articles 7 (Technical regulations, assessments, registrations, certificates, approvals and authorisations), 10 (State aid) and 11 (Other areas of North-South cooperation).

⁵⁷ EU-UK WA, Protocol on Ireland/Northern Ireland, Article 12.

⁵⁸ EU-UK WA, Article 10(1).

⁵⁹ EU-UK WA, Articles 13-16.

UK to ‘uphold [their] common high standards...at the end of transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters.’⁶⁰ While tricky to place on the spectrum of external DI, the Declaration imposes a very weak obligation on the UK to remain aligned to the EU law.

Alternative external DI arrangements are found in EU-Swiss SA on Schengen and the Energy Community Treaty. The establishment of the former is for the purpose of implementing, applying and developing the Schengen acquis.⁶¹ Annexes A and B of the agreement comprise the Schengen acquis. Article 2(3) provides for Switzerland’s dynamic obligation:

The acts and measures taken by the European Union and the European Community amending or building upon the provisions referred to in Annexes A and B, to which the procedures set out in this Agreement have been applied, shall also, without prejudice to Article 7, be accepted, implemented and applied by Switzerland. In this context, due account shall be taken of the period of time indicated by Switzerland in the Mixed Committee as being necessary to enable it to fulfil its constitutional requirements.

This obligation can be considered as imposing an unconditional obligation on Switzerland to ensure its continued alignment with EU law, as it develops. As evidenced in the text, it is conditional on the terms of Article 7. This provides that updates to either Annex ‘shall enter into force *simultaneously* for the European Union, the European Community and its Member States concerned and for Switzerland, unless those acts or measures explicitly state otherwise.’⁶² However, further subsections clarify that Switzerland retains the right to decide whether or not to implement measures into its internal legal order.⁶³ Further, the timeline for such a decision will depend on whether a referendum is required. In terms of surveillance and dispute settlement, the agreement’s established Mixed Committee is responsible.⁶⁴

The latter agreement extends the EU acquis to its contracting parties in four policy areas.⁶⁵ Following its specification in each, the agreement provides:

24. For the implementation of this Title, the Energy Community shall adopt Measures adapting the acquis communautaire described in this Title, taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties.

25. The Energy Community may take measures to implement amendments to the acquis communautaire described in this Title, in line with the evolution of European Community law.

To this end, the agreement established a Ministerial Council that is able to adopt legally binding decisions to adapt the transferred acquis.⁶⁶ In contrast to the examined obligation, the ECT’s alignment requirement is much more conditional. While previous obligations have stressed that contracting parties *shall* adopt measures to facilitate alignment, the ECT states that measures *may* be taken for the purpose of remaining aligned. Surveillance of compliance with the ECT falls to its Secretariat, which is an

⁶⁰ Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, TF50 (2019) 65 – Commission to EU 27, 17 October 2019.

⁶¹ EU-Swiss Schengen, Preamble.

⁶² EU-Swiss Schengen, Article 7(1). For the sake of clarity, the simultaneity mentioned here does not imply that the Annex amendment will enter into force at the same time as the internal EU law. Rather, it refers to the entry into force of amendments to the Annexes.

⁶³ EU-Swiss Schengen, Article 7(2)(a)-(b).

⁶⁴ EU-Swiss Schengen, Article 10.

⁶⁵ The four policy areas are Energy, Environment, Competition and Renewables. See The Energy Community Treaty, [2006] OJ L/198 (‘ECT’).

⁶⁶ ECT, Articles 24, 47, 76 and 79.

independent body.⁶⁷ Alternatively, dispute settlement is the responsibility of the Ministerial Council, which is comprised of the representatives of contracting parties.⁶⁸

Comparatively, the various agreements discussed can be displayed as follows:

Agreement	Obligation		Precision		Delegation	
	Strength	Scope	Substance	Time	Surveillance	Enforcement
EEA	Absolute	Hard	Hard	Hard	Hard	Hard
ECAA	Absolute	Partial	Hard	Hard	Partial	Hard
EU-UK WA	Absolute	Absolute	Absolute	Hard	Partial	Partial
EU-Swiss	Absolute	Partial	Hard	Partial	Soft	Partial
ECT	Absolute	Partial	Partial	Partial	Soft	Partial

Interpretative homogeneity

The extent of interpretative homogeneity requirements across EU international agreements tend to mirror the extent of a particular agreement's legislative homogeneity requirements. Accordingly, it is the EEA and ECAA that maintain the most detailed rules related to interpretative homogeneity. The relevant EEA provisions are found in Articles 6 and 105. The former provides:

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

The latter states:

1. In order to achieve the objective of the Contracting Parties to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement, the EEA Joint Committee shall act in accordance with this Article.
2. The EEA Joint Committee shall keep under constant review the development of the case-law of the Court of Justice of the European Communities and the EFTA Court. To this end judgments of these Courts shall be transmitted to the EEA Joint Committee which shall act so as to preserve the homogeneous interpretation of the Agreement.
3. If the EEA Joint Committee within two months after a difference in the case-law of the two Courts has been brought before it, has not succeeded to preserve the homogeneous interpretation of the Agreement, the [dispute settlement procedures] may be applied.

It is supplemented by Article 106:

⁶⁷ ECT, Articles 67-68.

⁶⁸ ECT, Article 54 and 91.

In order to ensure as uniform an interpretation as possible of this Agreement, in full deference to the independence of courts, a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice of the European Communities and the Court of First Instance of the European Communities and the Courts of last instance of the EFTA States shall be set up by the EEA Joint Committee.

There are a few things to unpack here. Firstly, the articles clearly express the desire that EEA rules be interpreted homogeneously (that is to say, in the same way) as internal EU rules. This is made explicit by their respective references to the goal of *uniform interpretation* or *in conformity*. Secondly, the scope of obligations are broad and immediate: they apply across the breadth of the agreement, are not limited to a particular set of rules or one policy area, and the rules substantially reproduce internal EU law. Moreover, they are to be effected instantaneously. Finally, and perhaps most importantly, the EEA establishes a detailed surveillance procedure to ensure that the jurisprudence of the EFTA Court and CJEU remains harmonious. The EEA Joint Committee is required to both keep under review the two Courts' jurisprudence and to establish procedures for the exchange of information between the two. Where there are differences between the Courts' jurisprudence, the EEA Joint Committee is to be responsible for its resolution, failing which recourse may be made to the EEA dispute settlement procedures. These procedures were discussed above in Section 3.

The ECAA follows a slightly different path. ECAA rules *identical in substance* to internal EU rules are to be interpreted in accordance with pre-signature CJEU case law.⁶⁹ In contrast, however, post-signature case law of the CJEU is to be communicated to the Contracting Parties and its implications are to be determined by the Joint Committee.⁷⁰ Notably, decisions by the EU Joint Committee under this procedure must be in conformity with the CJEU case law. Accordingly, the EU Joint Committee maintains a fundamental role in the surveillance of legislative homogeneity. The ECAA also establishes a procedure through which domestic courts of non-member states may submit questions concerning EU law to the CJEU.⁷¹ Where a domestic court is unable make a request to the CJEU, contracting parties may raise issues of interpretation with the Joint Committee which may act to secure the homogenous interpretation of the agreement.⁷²

While not striving for homogeneity, the EU-Swiss Schengen Agreement establishes a comparable mechanism. To ensure 'the most uniform possible application and interpretation', the Mixed Committee is to set up a dialogue mechanism for the transmission of CJEU case law to the Swiss Courts.⁷³ Additionally, Swiss Courts have the right to submit a statement of case or written observations to the CJEU where members states have made a preliminary reference concerning the Schengen acquis.⁷⁴ Moreover, Switzerland is to report annually to the Mixed Committee on how its courts have applied the Schengen acquis and, in the event of substantial divergence from the case-law of the CJEU, it may initiate the agreement's dispute settlement procedures.⁷⁵

An exception to the above account are the agreements in air transport (where the European Commission and the CJEU have competences in surveillance and arbitration in specified areas); and the Schengen and Dublin association agreements, where new measures within the acquis are to be directly

⁶⁹ ECAA, Article 16(1).

⁷⁰ Ibid.

⁷¹ ECAA, Article 16(2).

⁷² ECAA, Article 16(3).

⁷³ EU-Swiss Schengen, Article 8(1).

⁷⁴ EU-Swiss Schengen, Article 8(2).

⁷⁵ EU-Swiss Schengen, Article 9.

adopted subject to the approval of the Swiss legislature.⁷⁶ Consequently, a more ‘dynamic’ process of alignment is found in relation to Switzerland’s alignment with the relevant *acquis*.⁷⁷

Less well-developed provisions are found in other EU agreements. For instance, Articles 94 of the ECT provides:

The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty.

Comparably, Article 4 of the EU-UK WA states:

4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.

Similar provisions can be found across most categories of EU international agreements.⁷⁸ While each of these contains a broad commitment to remain aligned with the future developments in the interpretation of EU law as it develops, there are important differences in relation to the delegation that takes place within these agreements. Those of the EEA, ECAA and EU-Swiss Schengen are accompanied by an institutional setup that facilitates an ongoing dialogue between domestic courts and the CJEU together with surveillance by an independent third body. This is not the case for the latter agreement (i.e. EU-UK WA and ECT) which rely mainly on the work of their respective Joint Committees.

Agreement	Obligation		Precision		Delegation	
	Strength	Scope	Substance	Time	Surveillance	Enforcement
EEA	Absolute	Hard	Hard	Hard	Hard	Hard
ECAA	Hard	Partial	Hard	Partial	Partial	Hard
EU-UK WA	Absolute	Absolute	Absolute	Hard	Partial	Partial
EU-Swiss	Absolute	Partial	Hard	Partial	Soft	Hard
ECT	Partial	Partial	Partial	Partial	Partial	Soft

⁷⁶ Gstöhl, above n. 47, 860.

⁷⁷ Sabine Jenni, ‘Switzerland’s Regulatory European Integration: Between Tacit Consensus and Noisy Dissensus’, (2015) 21 *Swiss Political Science Review* 508, 513; Matthias Oesch, ‘Switzerland-EU Bilateral Agreements, the Incorporation of EU Law and the Continuous Erosion of Democratic Rights’, (2019) *Yearbook of European Law* 1, 11; Petrov, above n. 47, 194.

⁷⁸ EU-Turkey, Decision 1/95, Article 66; EU-Albania, Article 71(2); EU-Serbia, Article 73(2); EU-Morocco, Article 36(2); EU-Tunisia, Article 36(2).

3.3 Equivalence

The mechanism of equivalence is mainly used in EU-Swiss sectoral agreements ('SAs').⁷⁹ It is through the SAs that Switzerland's domestic law is aligned to EU law.⁸⁰ Through various annexes and appendices, EU law enters the Swiss domestic legal order by Switzerland adopting domestic law that is *equivalent* to EU law. The SAs are often described as 'static', meaning, in contrast to homogeneity, they do not envisage the adoption of 'post-signature' EU law.⁸¹ Rather than being updated on a 'quasi-automatic' basis, they are renegotiated on a case-by-case basis.⁸² The task of updating an agreement normally, although not always, falls to the relevant EC-Swiss Joint Committee.⁸³ Each SA has a Joint Committee that can make 'technical' adjustments to specified annexes or appendices of an SA, but not the main provisions of the SA.⁸⁴ In practice, Switzerland does not normally resist adjustment of the relevant EU *acquis*.⁸⁵ We examine alternative equivalence mechanisms found in two SAs, namely, those for the free movement persons and land transportation.⁸⁶ In each agreement, different variations of the equivalence obligation can be identified.

The purpose of the SA Free Movement is to guarantee freedom of establishment for EU citizens and Swiss nationals. It therefore prohibits discrimination against individuals on grounds of nationality and guarantees their right to entry and residence. The agreement, in terms of EU law, is centred around three Annexes. The right of establishment is to be created in accordance with Annex I, which refers to EU law in relation to the interpretation of the right to reside and the public order conditions under which rights of the SA may be restricted.⁸⁷ Annexes II and III, respectively, concern the coordination of social security rules and the recognition of professional qualifications. For such EU law references, Article 18 places Switzerland under a general obligation to take all measures necessary to ensure *equivalent* rights are available domestically:

References to Community law

1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations **equivalent** to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.
2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure

⁷⁹ Equivalence does crop up in other agreements. See EEA, Article 102(4) and EU-Ukraine, Article 66. It is also an important feature of EU mutual recognition agreements.

⁸⁰ Jenni, above n. 77, 509.

⁸¹ Petrov, above n. 47, 110.

⁸² René Schwok and Cenni Najy, 'Switzerland's bilateral approach to European integration: A model for Ukraine?', in Sieglinde Gstöhl (ed.), *The European Neighbourhood Policy in Comparative Perspective: Models, challenges, lessons* (Abingdon: Routledge, 2016), 130.

⁸³ The updating of SAs have been demonstrated to have significant impact on Swiss domestic legislation, see Sabine Jenni, 'Europeanization of Swiss Law-Making: Empirics and Rhetoric Drifting Apart', (2014) 20(2) *Swiss Political Science Review* 208.

⁸⁴ Marcus Vahl and Nina Grolimund, *Integration without Membership: Switzerland's Bilateral Agreements with the European Union* (Brussels: Centre of the European Policy Studies, 2006), 38. Note that two SAs do not establish a Joint Committee: the Agreement on Pensions and the Agreement on Taxation.

⁸⁵ Oesch, above n. 77, 5.

⁸⁶ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, [2002] OJ L114/6 ('SA Free Movement'), Article 1(a); Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, [2002] OJ L114/91 ('SA Land Transport').

⁸⁷ SA Free Movement, Article 7 and Annex I, Articles 4-5.

that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.⁸⁸

In addition, Annexes II and III, require the Switzerland ‘to apply [the listed EU law]...or rules equivalent to such acts’ at the date of signature.⁸⁹ EU acts listed in Section B of either Annex are to be taken into consideration, and those in Section C of Annex II are to be taken note of. Clearly, the later obligations are of a less binding nature. Switzerland’s obligation to achieve equivalence is unconditional. This is indicated paragraph (1) of Article 18 that states ‘shall take all measures necessary’. By virtue of nature of the SA, the scope of the obligation is limited to a single policy area. In terms of its precision, Annex I provides clear specification of the EU law for which there must be equivalent Swiss measures.

The equivalence obligation is also of an immediate nature. No transitional provisions are put in place and Switzerland is required to adopt equivalent measures promptly. Paragraph (2) of Article 18 also demonstrates a loose obligation to adhere to subsequent case-law of the CJEU. However, this is not a binding commitment. The agreement’s Joint Committee is responsible for the SA’s administration, which includes reviewing the impact of relevant Swiss domestic legislation and the settlement of disputes. There is no provision for third-party arbitration.⁹⁰ For Annexes II and III, but not Annex I, the Joint Committee is empowered to amend the listed law without having to go through the internal procedures of either contracting party, as is the case for amendments to Annex I.⁹¹ Further, the Joint Committee is responsible for the SA’s administration, which includes reviewing the impact of relevant domestic legislation and the settlement of disputes.⁹² Importantly, in this latter regard, there is no option of referral to the CJEU for matters concerning the interpretation of EU law.

We now turn to the second version of equivalence found in the SA Land Transport Agreement. The agreement’s aim is to develop a coordinated policy for the transportation of goods and passengers by road or rail.⁹³ Article 52(6) of the agreement establishes an obligation of equivalence for Switzerland:

With a view to attaining the objectives set out in this Agreement, the Contracting Parties shall, in accordance with the timetable laid down in Article 49, take all necessary measures to ensure that the rights and obligations **equivalent** to those contained in the legal instruments of the Community, as listed in Annex 1, are actively applied in the course of their relations.

Annex I is split into five sections each of which lists the relevant provisions of the EU’s transport acquis, which, ‘in accordance with Article 52(6) of this Agreement, Switzerland shall apply legal provisions equivalent.’⁹⁴ Taken together, a clear and unconditional obligation, albeit of a limited scope in terms of the acquis, is imposed on Switzerland to establish equivalent domestic laws to the listed EU law. The strength of this obligation is emphasised by the fact that Switzerland must notify the adoption of domestic legislation in this area to the EU and seek its opinion on such legislation.⁹⁵ The precision of the obligation can be rated high: there is clear specification of the EU law for which there must be Swiss equivalents. The timeline for equivalence is not the same for all sections of Annex I. For EU measures contained Section 3, technical conditions related to road transport, Switzerland is not under an immediate obligation to adopt equivalent national laws. Rather, Switzerland has a transitional period of

⁸⁸ SA Free Movement, Article 16.

⁸⁹ SA Free Movement, Annex II, Article 1(1), and Annex III, Article 1(1)

⁹⁰ SA Free Movement, Articles 17 and 19.

⁹¹ SA Free Movement, Article 18.

⁹² SA Free Movement, Articles 17 and 19.

⁹³ A separate bilateral agreement addresses issues of civil aviation, see Agreement between the European Community and the Swiss Confederation on Air Transport, [2002] OJ L114/73.

⁹⁴ SA Land Transport, Annex I.

⁹⁵ SA Land Transport, Article 52(2)-(3).

two years in which to make its technical arrangements equivalent to those of the EU.⁹⁶ For other sections of Annex I, there is an immediate obligation for Switzerland to adopt equivalent national law. In contrast to the SA Free Movement, there is no obligation to stay dynamically aligned with evolving EU law.

Supervision of the agreement falls to its established Joint Committee, which is to be made up of EU and Swiss representatives.⁹⁷ The Committee is able to revise Annex I, at the request of a contracting party, ‘so as to take account of developments in Community legislation in this area.’⁹⁸ This suggests Annex I will be updated to follow EU law and that there is an element of dynamism in the agreement. Decisions of the Joint Committee are not legally binding. Instead, the EU and Switzerland are to carry them out in accordance with their own rules. Leaving the effects of decisions to the contracting parties reflects the SA’s overall bent toward reciprocity. Disputes on the interpretation of the SA Land Transport are to be resolved through the Joint Committee.⁹⁹ Importantly, there is no recourse to the CJEU for the interpretation of EU law. The consequence is a diplomatic model of dispute resolution.

In comparing the equivalence mechanisms of either SA, the following classifications can be made:

Agreement	Obligation		Precision		Delegation	
	Strength	Scope	Substance	Time	Surveillance	Enforcement
Free movement	Absolute	Partial	Hard	Hard	Soft	Soft
Land transport	Absolute	Partial	Hard	Partial	Soft	Soft

3.4 Approximation

Approximation requirements appear frequently in EU international agreements. The term can be compared to harmonisation, which does not regularly feature in EU agreements, in that it requires a third party to align its domestic law with EU law at some point in the future.¹⁰⁰ An important distinction can be drawn between binding and non-binding approximation. Binding approximation requirements are identifiable by the precision of their language and the fact that they delegate authority for their interpretation and implementation.¹⁰¹ In EU international agreements, they characterised by expressions such as ‘shall ensure’, ‘shall take necessary measures’ or ‘undertake to authorise’.¹⁰² Non-binding

⁹⁶ SA Land Transport, Article 7(2).

⁹⁷ SA Land Transport, Article 51.

⁹⁸ SA Land Transport, Article 55(2).

⁹⁹ SA Land Transport, Article 54.

¹⁰⁰ It should be noted that the distinction between approximation and harmonisation is quite difficult to decipher. Given the EU Treaties seem to use the term interchangeably (see TFEU, Article 114). What is important to emphasise is that approximation/harmonisation within the EU implies a mutuality or mutual adjustment, whereas approximation/harmonisation in external agreements works only in one direction (i.e. third country approximating to EU rules).

¹⁰¹ Shaffer and Pollack, above n. 13, 714-715.

¹⁰² Petrov, above n. 47, 196.

approximation refers to those rules that are not formally binding¹⁰³, which may result from their vagueness or the fact they are not subject to third-party interpretation or implementation.¹⁰⁴ In EU international agreements, they are associated with terminology such as ‘shall take the necessary measures in order to gradually achieve’, ‘shall seek to promote the use of Community regulations’, ‘will establish a plan’ and ‘will cooperate in order to align’.¹⁰⁵ Additionally, they do not impose deadlines for the completion of the action in question. The remainder of this section identifies and discusses examples of both forms of approximation.

Binding approximation

Earlier examples of binding approximation are found in Decision 1/95 of the EC-Turkey Association Council.¹⁰⁶ While the Ankara Agreement aimed to establish a customs union between Turkey and the EU¹⁰⁷, with the possibility of eventual full Turkish membership, it was through subsequent decisions of its Association Council that the customs union materialised.¹⁰⁸ Early decisions of the Association Council covered administrative cooperation and rules of origin for agriculture, further substantive concessions for agriculture, and limited rights for Turkish workers.¹⁰⁹ It was, however, Decision 1/95 that completed the EU-Turkey customs union and, on the basis of which, Turkey must adhere to the Common Commercial Policy and apply the substantive customs acquis.¹¹⁰ Further, it must ‘align itself with the EC preferential customs regime’ and apply ‘substantially the same commercial policy as the Community’ in the textile sector, including the agreements on trade in textiles and clothing.¹¹¹

Decision 1/95 of the Association Council imposes a number of binding approximation requirements on Turkey. For example, Article 8(1) provides:

1. Within **five years** from the date of entry into force of this Decision, Turkey **shall incorporate** into its **internal legal order** the Community instruments relating to the removal of technical barriers to trade.
2. The list of these instruments and the conditions and detailed arrangements governing their implementation by Turkey shall be laid down by decision of the Association Council within a period of **one year** from the date of entry into force of this Decision.

¹⁰³ David Trubek, Patrick Cottrell and Mark Nance, ‘Soft Law’, ‘Hard Law’ and EU Integration’, in Grainne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US: Law and New Governance in the EU and the US* (Hart Publishing, 2006), 65.

¹⁰⁴ Shaffer and Pollack, above n. 13, 715.

¹⁰⁵ Petrov, above n. 47, 196.

¹⁰⁶ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, [1996] OJ L035/1 (‘Decision 1/95’).

¹⁰⁷ Agreement establishing an Association between the European Economic Community and Turkey, [1973] OJ C113/2 (‘Ankara Agreement’), Articles 10 and 28.

¹⁰⁸ The Association was developed further through an Additional Protocol (the ‘1970 Protocol’) that tasked the Association Council with developing relations between parties in specific policy areas, see Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, [1972] OJ L361/59 (the ‘1970 Protocol’).

¹⁰⁹ Steve Peers, ‘Living in Sin: Legal Integration Under the EU-Turkey Customs Union’, (1996) 7 *European Journal of International Law* 411, 413.

¹¹⁰ Decision 1/95, Article 28.

¹¹¹ Decision 1/95, Articles 12-13.

Subsequently, Decision 2/97 was adopted by the Association Council and specified the EU measures to be adopted by Turkey.¹¹² Article 2 clarified that EU regulations were to be made part of Turkey's internal legal order, while it would be free to determine how directives are to be implemented. Decision 2/97 came into effect on 1 January 1997. This example neatly captures how binding approximation requirements can effectively facilitate alignment with EU law. Decision 1/95 imposed an unconditional obligation on Turkey to align with EU law on a future date. In terms of its precision the obligation is lacking as it does not state what EU law is to be adopted, rather it refers broadly to 'technical barriers to trade'. However, it does set a deadline, five years, and delegates determination of the substance of the obligation to the Association Council, which itself has one year to come up with a list of EU law with which there is to be alignment.

A similar approach is found in the area of competition law. The 1970 Protocol established the basis for Turkey's future approximation with EU competition law.¹¹³ However, it left the details to the Association Council. Binding harmonisation requirements are imposed by Article 39 of Decision 1/95, under which Turkey was required to establish domestic competition laws implementing Articles 101 and 102 TFEU and establish a competition authority to implement them. Further, it had one year to adopt EU block exemption regulations together with relevant EU secondary legislation and case law. The Association Council is responsible for monitoring Turkey's approximation and is able to settle disputes; failing such settlement, disputes may be referred to the CJEU or any other court or tribunal.¹¹⁴

More recent examples of binding harmonisation requirements can be found in the AAs with Deep and Comprehensive Trade Areas ('DCFTAs'). Such agreements have been concluded with Georgia, Moldova and Ukraine.¹¹⁵ The DCFTA of each agreement represents a standalone Title ('Trade and trade-related matters') with individualised rules. Its purpose is to provide access to the internal market in selected sectors and grant EU investors in those sectors the same regulatory environment in the associated country as in the EU. To this end, binding approximation requirements are established for a wide range of policy areas.¹¹⁶

For our purposes, what is significant about such rules is their level of precision. For instance, if we take the policy area of public procurement, it can be seen that each agreement establishes highly detailed approximation requirements, composed of three parts, on their respective third countries. The first part requires the third country to submit to the relevant committee 'a comprehensive roadmap' for the approximation of the Union procurement acquis, as specified individual Annexes to each agreement.¹¹⁷ The Annexes list the time period for alignment with relevant EU law (ranging from 6 month to 8 years) as well as the market access to be granted on completion of approximation. Following a favourable opinion of the relevant Committee, the roadmap will then serve as the reference document for

¹¹² Decision No 2/97 of the EC-Turkey Association Council of 4 June 1997 establishing the list of Community instruments relating to the removal of technical barriers to trade and the conditions and arrangements governing their implementation by Turkey, [1997] OJ L 191/1.

¹¹³ 1970 Protocol, Article 43.

¹¹⁴ Ankara Agreement, Article 25.

¹¹⁵ 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, [2014] OJ L261/4 ('EU-Georgia'); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, [2014] OJ L260/4 ('EU-Moldova'); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, [2014] OJ L161/3 ('EU-Ukraine').

¹¹⁶ Relevant areas include technical barriers to trade; sanitary and phytosanitary measures; customs and trade facilitation; establishment, trade in services and electronic commerce; and, public procurement. In addition, the EU-Ukraine includes binding approximation requirement for competition law.

¹¹⁷ EU-Georgia, Article 145 and Annex XVI-B; EU-Moldova, Article 272 and Annex XXIX-B; EU-Ukraine, Article 152 and Annex XXI-A.

approximation. The second part places an unconditional obligation on each non-member state to approximate:

1. [Non-member state] **shall ensure** that its existing and future legislation on public procurement will be gradually [made compatible/approximated] with the Union *acquis* on public procurement.
2. Approximation to the Union *acquis* shall be carried out **in consecutive phases** as set out in the schedule in [relevant Annexes]...In that process, **due account shall be taken** of the corresponding case law of the Court of Justice of the European Union and the implementing measures adopted by the European Commission, as well as, should it become necessary, of any modifications of the Union *acquis* occurring in the meantime. The implementation of each phase **shall be evaluated** by the Association Committee in Trade configuration...and, following a **positive assessment** by that Committee, it shall be linked to the reciprocal granting of market access...The European Commission shall notify without undue delay the [non-member state] of any modifications to the Union *acquis*.¹¹⁸

The final part is in relation to the opening of market access, which provides:

1. The Parties agree that the **effective and reciprocal opening** of their respective markets shall be attained gradually and simultaneously. During the process of approximation, the extent of the **market access** mutually granted shall be linked to the progress made in that process as stipulated in [relevant Annex].
2. The decision to proceed to a further phase of market opening shall be made on the basis of an assessment of the quality of the legislation adopted as well as its practical implementation. Such assessment shall be carried out regularly by [relevant committee].¹¹⁹

In comparison to the approach of Decision 1/95, it is evident that more recent approximation requirements have developed significantly. In terms of their precision, there is a much clearer expression of what each non-member state must adopt and when. Moreover, they draw an explicit link between the degree of approximation achieved and the degree of access to the internal market. The relevant Association Committees of each agreement are also given a clear mandate in conducting surveillance of approximation. An additional factor is that both the EU-Georgia and -Moldova agreements have standalone chapters for approximation.¹²⁰ These impose further obligations on non-member states, including: reporting requirements on efforts to approximate, repealing inconsistent domestic legislation, the terms according to which the EU will assess approximation, and duty to stay dynamically aligned with EU law. In terms of their enforcement, separate agreements also differ slightly. While each agreement establishes somewhat standard dispute settlement procedures that allows for referral to be made to the CJEU, the EU-Georgia and -Moldova agreements preclude their rules on approximation forming the subject of dispute settlement.¹²¹

It is important to note that binding approximation requirements are also found in other types of agreements. For example, the Comprehensive and Enhanced Partnership Agreement with Armenia contains an obligation to approximate its legislation with EU law as specified in accompanying Annexes.¹²² As was the case previously, the Annexes list various internal EU law measures that are accompanied by a timetable for implementation. The unconditional nature of this obligation is

¹¹⁸ EU-Georgia, Article 146; EU-Moldova, Article 273; EU-Ukraine, Article 153.

¹¹⁹ EU-Georgia, Article 147; EU-Moldova, Article 274; EU-Ukraine, Article 154.

¹²⁰ EU-Georgia, Chapter 15: General provisions on approximation under Title IV; EU-Moldova, Chapter 15: General provisions on approximation under Title V.

¹²¹ EU-Georgia, Articles 267 and 276(4); EU-Moldova, Articles 403 and 412(4); EU-Ukraine, Article 322.

¹²² 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, [2018] OJ L23/4 ('CEPA Armenia'). Such approximation requirements are found in the policy fields of sustainable transport, energy, environment, climate change, information society, consumer protection, employment, and anti-fraud.

emphasised in the CEPA's final provisions.¹²³ Moreover, the approximation requirements are of a precise nature. Further, the surveillance authority established by the CEPA, its Partnership Council, is able to update the relevant Annexes to maintain their alignment with EU law and monitor Armenia's approximation progress.¹²⁴ Dispute settlement is purely diplomatic, through the Partnership Council, and CJEU referral is available only in selected areas, none of which are relevant to the binding approximation requirements.¹²⁵

The examined agreements rank accordingly:

Agreement	Obligation		Precision		Delegation	
	Strength	Scope	Substance	Time	Surveillance	Enforcement
EC-Turkey	Absolute	Partial	Hard	Partial	Soft	Soft
DCFTAs	Absolute	Partial	Hard	Partial	Soft	Soft
Armenia	Absolute	Partial	Hard	Partial	Hard	Soft

Non-binding (general) approximation

Approximation of a less binding nature can be distinguished from the above on account of its conditional nature, lack of precision and unclear delegation. Some simple examples can be taken from the EU's association agreements with DCFTAs. The EU-Ukraine Agreement, Article 403, provides that '[p]arties shall cooperate to promote agricultural and rural development, in particular through gradual approximation of policies and legislation.' Alternatively, the EU-Georgia, Article 47(4), states 'Georgia shall use best endeavours to ensure that its standards body: (a) progressively transposes the corpus of European standards (EN) as national standards.' A more detailed example of a non-binding approximation requirements is found in the EU's Stabilisation and Association Agreements ('SAAs'). The Stabilisation and Association Process is the EU's policy towards the Western Balkan states, and its aim is to stabilise the region and establish a free-trade area with the eventual goal of EU membership for the relevant states.¹²⁶ With this in mind, and in contrast to the agreements considered below, the SAAs operate against a backdrop of strict pre-accession conditionality meaning they are subject to stricter enforcement mechanisms outside the agreements themselves. Most SAAs contain the same 'Approximation of laws' obligation:

1. The Parties **recognise** the importance of the approximation of [country] existing legislation to that of the Community and of its effective implementation. [Country] **shall endeavour** to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. [Country] shall ensure that existing and future legislation shall be properly implemented and enforced.

¹²³ CEPA Armenia, Article 370.

¹²⁴ CEPA Armenia, Articles 371-372.

¹²⁵ CEPA, Armenia Articles 342 and 378. Referrals to CJEU are available for non-binding approximation in the context of postal services, electronic communication services, financial services, and transport services.

¹²⁶ https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en

2. This approximation shall start on the **date of signing** of this Agreement, and shall **gradually extend** to all the elements of the Community acquis referred to in this Agreement by the end of the transitional period as defined in [relevant Article].¹²⁷
3. ...Approximation will be carried out on the basis of a programme to be agreed between the Commission of the European Communities and [relevant Article].
4. [Country] shall also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken.¹²⁸

A general approximation clause is found in the Euro-Med Association Agreements. These agreements are the result of the Barcelona Process in 1995, involving ten Mediterranean partners, which resulted in several Association Agreements. The objectives of the partnership are the establishment of a zone of peace, prosperity and stability in the region without formal membership. Each agreement contains a 'Approximation of legislation' clause that alternatively reads:

Cooperation shall be aimed at helping [Country] to bring its legislation closer to that of the Community in the areas covered by this Agreement.¹²⁹

Or:

The Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement.¹³⁰

Further, general approximation clauses are identifiable in a number of partnership and cooperation agreements ('PCAs'). By way of background, PCAs aim to provide a suitable framework for political dialogue, support the efforts made by the countries to strengthen their democracies and develop their economies, accompany their transition to a market economy, and encourage trade and investment. The

¹²⁷ EU-Albania, Article 6 (ten years); EU-Serbia, Article 8 (six years); EU-Bosnia and Herzegovina, Article 8 (six years), EU-Macedonia, Article 5 (ten years); EU-Montenegro, Article 8 (five years).

¹²⁸ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, [2009] OJ L107/2 ('EU-Albania'), Article 70; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, [2013] OJ L278/16 ('EU-Serbia'), Article 72; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part ('EU-Bosnia and Herzegovina'), [2015] OJ L164/2, Article 70; 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 ('EU-Macedonia'), [2004] OJ L84/13, Article 68; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, [2010] OJ L108/1 ('EU-Montenegro'), Article 72.

¹²⁹ 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, [1998] OJ L97/2, Article 52; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2000] OJ L70/2, Article 52; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, [1997] OJ L187/3, Article 41; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, [2005] OJ L265/2, Article 56.

¹³⁰ Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, [2006] OJ L143/2, Article 49; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, [2005] OJ L283/10, Article 69; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, [2004] OJ L304/39, Article 48.

agreements establish a Cooperation Council responsible for supervising the implementation of the PCAs. The relevant clause of each reads¹³¹:

1. The Parties recognize that an important condition for strengthening the economic links between [Country] and the Community is the approximation of legislation. [Country] shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.
2. The approximation of laws shall extend to the following areas in particular [listed sectors].

In most instances, this clause is supplemented by an EU commitment to provide technical assistance to the third country in question. In contrast to binding approximation clauses, what distinguishes these types of approximation clauses, as a mechanism of external DI, is the conditional nature of the obligations they lay down. They do not impose binding obligations on the third country in question. Rather, they express an intention to move towards approximation at a later date. In this regard, some obligations are more precise than others. While the general clauses of the Euro-Med agreements do not establish a framework, those found in the SAA do contain a greater degree of precision and impose certain minor obligations.

3.5 Cooperation

As found in EU international agreements, cooperation clauses are typically non-binding commitments that represent a roadmap for future integration. They can be distinguished from non-binding approximation on the basis that there is not even a stated aspiration to approximate with EU law. On such a basis, one could legitimately question whether such clauses constitute external DI. Here, it is argued that they fall within the scope of external DI because they represent an initial step towards legal transfer for the *acquis*. However, this is not the case for all of the cooperation clauses surveyed. As will be seen below, there are cooperation clauses that do not offer any concrete prospect of legal transfer. Relevant clauses can be identified by phrases such as: ‘shall take the necessary measures in order to gradually achieve’, ‘shall seek to promote’, ‘will establish a plan’, ‘will cooperate in order to’. This section identifies three versions of such clauses, namely: directed, sectoral and general. Additionally, reference is made to institutional cooperation that may be established by specific EU international agreements.

Directed cooperation

The EEA Agreement lists ten policy areas, ranging from social policy to civil protection, as potential avenues for future cooperation.¹³² The EEA specifies the six forms that cooperation ‘shall normally’ take: participation by EFTA States in EU programmes; establishment of joint activities; formal and informal exchange or provision of information; common efforts to encourage certain activities; parallel legislation, where appropriate, of identical or similar content; coordination, where this is of mutual interest.¹³³ The penultimate form found on the list makes clear that the approximation of legislation in particular fields is a future possibility, although there is no formal obligation to approximate. Additionally, there is an individual EEA Protocol on cooperation in fields outside the four freedoms.

¹³¹ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, [1997] OJ L327/3 (‘PCA Russia’), Article 55; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, [1999] OJ L246/3 (‘PCA Azerbaijan’), Article 43; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, [1999] OJ L229/3 (‘PCA Uzbekistan’), Article 42; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part, [1999] OJ L196/48 (‘PCA Krgyz’), Article 44.

¹³² EEA, Article 78.

¹³³ EEA, Article 80.

This lists various policy areas, such as environment, education and social policy, in relation to which contracting parties have agreed to cooperate.¹³⁴ More recent agreements continue to contain detailed cooperation commitments. Association Agreements with DCFTAs provide for wide-ranging cooperation commitments in field such as tourism, civil protection, fisheries and maritime policy, regional development, cultural fields, agriculture and rural development, and industrial and enterprise policy. The commitments in each are structured in a similar way: (a) an expressed aim of cooperation in the policy area, (b) a statement of principles underpinning cooperation, (c) a list of the forms that cooperation may take, and (d) a commitment for the contracting parties to maintain a regular dialogue.

Sectoral cooperation

In certain fields, cooperation commitments will specifically reference EU law. For example, the EU-Georgia and EU-Ukraine agreements set out broad aims for cooperation in education and training: Georgia is required to ‘conduct and develop policy consistent with the framework of EU policies and practices with reference to documents in Annex XXXII’; Ukraine ‘shall cooperate taking into consideration the provisions of the recommendations listed in Annex XLII to this Agreement’.¹³⁵ Each Annex makes reference to recommendations of the European Parliament.

Weaker cooperation requirements are expressed in the SAAs with the Western Balkan states. For instance, in the fields of social policy and education and training, parties are required to cooperate together with a view to upgrading the state of play of their domestic legal systems.¹³⁶ In each sector, the requirements go no further than stating that cooperation ‘shall *take due account* of priority areas related to the Community acquis in this field.’ For the policy area of environment, loose cooperation requirements are also imposed. These require ‘cooperation with the aim of strengthening administrative structures and procedures to ensure strategic planning of environment issues and coordination between relevant actors’ that *shall focus* on the alignment of third-countries with the EU acquis.¹³⁷

General cooperation

EU international agreements may contain general statements that Parties shall cooperate in specified fields. For example, the EU-UK Political Declaration states: ‘Parties should engage in dialogue and exchanges in areas of shared interest, with the view to identifying opportunities to cooperate...such as culture, education science and innovation.’¹³⁸ Other examples are found in the Euro-Med agreements that contain individual provisions on cooperation. For social policy, each agreement aims to consolidate cooperation between parties in the field of social policy.¹³⁹ Each agreement sets a number of ‘priority areas’ that include, amongst others, (a) promoting the economic development of women; (b) improving social security, and (c) enhancing healthcare coverage. Again, the Association Council is made responsible for setting up a working party that is to be responsible for the continuous and regular evaluation of the implementation of cooperation efforts.¹⁴⁰ Additionally, loose cooperation requirements

¹³⁴ Protocol 31 on cooperation in specific fields outside the four freedoms (‘Protocol 31’).

¹³⁵ EU-Georgia, Article 361; EU-Ukraine, Article 435.

¹³⁶ EU-Albania, Articles 99 (social policy) and 100 (education and training); EU-Serbia, Articles 101 (social policy) and 102 (education and training); EU-Bosnia and Herzegovina, Articles 99 (social policy) and 100 (education and training); EU-Macedonia, Articles 90 (social policy) and 91(education and training); EU-Montenegro, Articles 101 (social policy) and 102 (education and training).

¹³⁷ EU-Albania, Article 108; EU-Serbia, Article 111; EU-Bosnia and Herzegovina, Article 108; EU-Montenegro, Article 111.

¹³⁸ EU-UK Political Declaration, para. 14.

¹³⁹ EU-Morocco, Article 71; EU-Tunisia, Article 71; EU-Palestine, Article 45; EU-Algeria, Article 74; EU-Lebanon, Article 63; EU-Jordan, Article 82; EU-Egypt, Article 62.

¹⁴⁰ Ibid.

can be identified for both education and training and environment.¹⁴¹ However, unlike those related to social policy, these are not supposed by the Association Council or a relevant working party. In a similar vein, the PCAs list a broad range of areas for cooperation and provide for third countries to participate in Community programmes.¹⁴² The EPCAs with Armenia and Kazakhstan upgrade this to ‘with a view to promoting the modernisation of the education and training systems in the Republic of Kazakhstan and convergence with policies and practices of the European Union’.¹⁴³ However, overall, general cooperation clauses such as these offer only the remotest possibility for legal transfer for the *acquis*.

Institutional cooperation

An alternative form of cooperation is the EU-Swiss SA for cooperation on competition law.¹⁴⁴ The SA’s purpose is to facilitate cooperation between EU and Swiss competition authorities and to prevent conflict between the two.¹⁴⁵ Comparable SAs exist for Eurojust and Europol.¹⁴⁶ The SA for competition law creates a process where the two authorities are able to share information relating to enforcement actions.¹⁴⁷ Pointedly, it rules out the potential for the SA to change the competition laws of either party.¹⁴⁸ Accordingly, the SA does not facilitate external DI. Further, there is no delegation to a supervisory authority or enforcement procedure, with direct consultations serving as the basis of dialogue between parties.¹⁴⁹

3.6 Participation

A final port of call is to examine how external DI can be facilitated through the participation of third countries in EU agencies or programmes. Most EU agencies allow for the full participation of third countries, under certain conditions and as provided for by the terms of their establishment.¹⁵⁰ For the majority, this requires the adoption of EU law within the field covered by the agency or of legislation recognised as equivalent to EU law.¹⁵¹ This section examines the external DI obligations found in three types of participatory arrangements. As was the case for the previous section, it is arguable that that participatory arrangements do not constitute external DI. This is certainly the case for some of

¹⁴¹ EU-Morocco, Article 46 (education) and 48 (environment); EU-Tunisia, Article 46 (education) and 48 (environment); EU-Palestine, Articles 50 (environment) and 58 (education); EU-Algeria, Articles 52 (environment) and 77 (education); EU-Lebanon, Articles 45 (environment) and 43 (education); EU-Jordan, Articles 63 (education) and 85 (environment); EU-Egypt, Articles 42 (education) and 44 (environment).

¹⁴² An example is the provisions of PCAs in the field of education: PCA Azerbaijan, Article 53; PCA Russia, Article 63; PCA Uzbekistan, Article 51; PCA Kyrgyzstan, Article 52.

¹⁴³ EPCA Armenia, Article 93; EPCA Kazakhstan, Article 244.

¹⁴⁴ Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, [2014] OJ L347/3 (‘SA Competition Law’).

¹⁴⁵ SA Competition Law, Article 1.

¹⁴⁶ See Agreement between Eurojust and Switzerland and Agreement between Swiss Confederation and the European Police Office. Available at: <https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen/abkommen-umsetzung/abkommenstexte.html>.

¹⁴⁷ SA Competition Law, Article 3(1).

¹⁴⁸ SA Competition Law, Article 13.

¹⁴⁹ SA Competition Law, Article 11.

¹⁵⁰ Of the EU’s 36 agencies, 23 allow for non-member state participation. See Nicolai von Ondarza and Camille Borrett, ‘Brexit and EU agencies What the agencies’ existing third country relations can teach us about the future EUUK relationship’, (2018) *SWP Working Paper*, 12.

¹⁵¹ *Ibid*.

arrangements surveyed and we highlight where this is the case. For other arrangements, however, such clauses can lay the foundation for future legal transfer.

Bilateral international agreements

Here, our focus is on two EU-Swiss SAs, which provide for the participation of Switzerland in the European Environment Agency ('EEA') and **European Environment Information and Observation Network ('EEION')** and, separately, Creative Europe, and two EU-Turkey bilateral agreements, which enable Turkish participation of the EEA and EEION and European Monitoring Centre for Drugs and Drug Addiction ('EMCDDA').¹⁵²

Both EU-Swiss SAs require application of the relevant EU acquis as specified in their respective Annexes.¹⁵³ However, the obligations included in these SAs differ slightly. The SA Environment requires that 'Switzerland...shall apply the acts listed in Annex I'.¹⁵⁴ In return, Switzerland is able to fully participate, without the right to vote, in the Agency Management Board and shall be associated with the work of the Scientific Committee of the Agency.¹⁵⁵ Conversely, the SA Creative Europe provides 'Switzerland shall implement the measures described in Annex I, with a view to completing its legislative framework so as to ensure the required level of compatibility with the *acquis communautaire*'.¹⁵⁶ In contrast, neither of the EU-Turkey SA agreements noted above require application of the relevant EU law. Additionally, the two EU-Swiss SAs together with the EU-Turkey Environment obligate the establishment/designation of appropriate domestic institutions for participation purposes.¹⁵⁷

The language used in both of the EU-Swiss SAs indicates an unconditional obligation ('shall apply'/'shall implement'). This can be contrasted with non-binding obligations of the EU-Turkey agreements, which require relevant EU law to be taken into account or considered.¹⁵⁸ Clearly, the scope of either EU-Swiss SA is limited to the single pieces of EU law found in their respective Annexes. The separate obligations are therefore distinctly narrow. But within that scope there is a strong external DI obligation. In terms of their precision, the two SAs clearly specify what it is to be adopted by Switzerland. The primary obligation to adopt the listed EU legislation is of an immediate nature. The SAs differ, however, in terms of their precision as it relates to the establishment of domestic Swiss

¹⁵² Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network, [2006] OJ L90/37 ('SA Environment'). Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programme MEDIA 2007, [2007] OJ L303/11 ('SA Creative Europe'); Agreement between the European Community and the Republic of Turkey concerning Turkey's participation in the European Environment Agency and the European Environment Information and Observation Network, [2001] OJ L213/112 ('EU-Turkey Environment'); Council Decision of 5 June 2007 on the signing of the Agreement between the European Community and the Republic of Turkey on the participation of the Republic of Turkey in the work of the European Monitoring Centre for Drugs and Drug Addiction, [2007] OJ L323/23 ('EU-Turkey EMCDDA').

¹⁵³ SA Environment, Article I lists Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, [1990] OJ L120/1; as amended by Council Regulation (EC) No 933/1999 of 29 April 1999, [1999] OJ L117/1 and Regulation (EC) No 1641/2003 of the European Parliament and of the Council of 22 July 2003, 2003 OJ L245/1. SA Creative Europe, Annex I lists Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

¹⁵⁴ SA Environment, Article 1.

¹⁵⁵ SA Environment, Article 3.

¹⁵⁶ SA Creative Europe, Article 2.

¹⁵⁷ SA Environment, Articles 4-5; SA Creative Europe, Article 5; EU-Turkey Environment, Articles 4-5.

¹⁵⁸ EU-Turkey Environment, Preamble; EU-Turkey EMCDDA, Preamble.

institutions. The SA Environment gives Switzerland six months from the entry into force of the agreement to make relevant designations or establishments. In contrast, the SA Creative Europe does not impose a deadline. Both SAs establish a Joint Committee for the purpose of administering the agreement and amending any of its annexes.¹⁵⁹ Unlike its counterpart, the SA Creative Europe states explicitly that its Joint Committee is responsible for the settlement of disputes. Further, the Commission is given responsibility for monitoring and evaluating Switzerland's national measures adopted pursuant to the SA Creative Europe.¹⁶⁰ Alternatively, the EU-Turkey Environment leaves implementation to either contracting part to decided and the EU-Turkey EMCDDA remains silent on the issue.¹⁶¹

Bilateral cooperation agreements

That said, EU agencies can propose to third countries that they engage in bilateral cooperation and can establish institutional ties by signing formal working/strategic/technical/operational arrangements with a third country.¹⁶² These forms of working arrangements are often restricted to technical collaboration underlining the relevant agencies' capacity building function. Cooperation can be proposed to a third country only if the relevant EU institutions has given its approval. Currently, Frontex has 20 'working arrangements' with non-EU countries and international organisations.¹⁶³ The intended purpose of such arrangements is to establish a structured dialogue between Frontex and the partner country to facilitate the exchange of information and technical expertise.¹⁶⁴ Frontex also has working arrangements with the Commonwealth of Independent States and MARRI Regional Centre. Europol has 17 'operational agreements' with non-EU states and one such agreement with an international organisation (Interpol).¹⁶⁵ Such arrangements exist for CEPOL, Eurojust, EMCDDA and ECDC.

We examine a selection of the such arrangements in relation to the identified three criteria. Working arrangements aim to facilitate cooperation, within the relevant fields, between EU agencies and third countries counterparts. For example, Frontex arrangements aim to facilitate cooperation between the agency and border authorities of third countries.¹⁶⁶ Cooperation agreements pursue similar aims in relation to the working arrangements of both Europol and Eurojust.¹⁶⁷ They do not explicitly obligate a third country to adopt EU law or to align its domestic law with EU law. In relation to our three criteria, working arrangements will score poorly across the board. While convergence may lead to the harmonisation of practices and policies¹⁶⁸, the working arrangements themselves do not contain any obligation to adopt EU law or align with EU law. On this basis, such arrangements fall outside the scope

¹⁵⁹ SA Environment, Article 16; SA Creative Europe, Article 8.

¹⁶⁰ SA Creative Europe, Article 9.

¹⁶¹ EU-Turkey Environment, Article 14.

¹⁶² Dovilė Rimkutė and Karina Shyrokykh, 'The Role of EU Agencies in the Acquis Transfer: The Case of the European Neighbourhood Policy Countries', (2017) *TARN Working Paper Series* 14/2017, 3-4.

¹⁶³ Frontex, 'Working arrangements with non-EU Countries'. Available at: <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>. Accessed 6 December 2019.

¹⁶⁴ Examples of this include the working arrangements with Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Cape Verde, Georgia, Moldova, Nigeria and Serbia.

¹⁶⁵ Europol, 'Operational agreements'. Available at: <https://www.europol.europa.eu/partners-agreements/operational-agreements>. Accessed 6 December 2019.

¹⁶⁶ See for example: Working Arrangement establishing cooperation between Frontex and Ministry of Interior for Albania ('Frontex-Albania'), Article 4; Working Arrangement establishing cooperation between Frontex and the State Border Committee of the Republic of Belarus ('Frontex-Belarus'), Article 3; Working Arrangement establishing cooperation between Frontex and the Nigerian Immigration Service ('Frontex-Nigeria'), Article 4.

¹⁶⁷ Such as: Agreement on Operation and Strategic Co-operation between the Republic of Albania and Europol ('Europol-Albania'), Article 1; Agreement on Cooperation between Eurojust and Georgia ('Eurojust-Georgia'), Article 2;

¹⁶⁸ Rimkutė and Shyrokykh, above n. 162, 4.

of external DI. Separately, it should be noted that each Frontex working arrangement explains that it does not constitute an international treaty.¹⁶⁹ Moreover, in terms of the delegation achieved by these working arrangements, they rely on purely diplomatic methods of surveillance and enforcement. The Frontex arrangements are silent on both issues. In contrast, arrangements of Europol and Eurojust provide by for continued monitoring by the contracting parties.¹⁷⁰ Additionally, the Europol and Eurojust working arrangements provide for disputes are to be resolved by negotiation of the parties.¹⁷¹

Participation in EU programmes

The EU has a number of internal programmes, established for the benefit of member states and in order to support internal policies, which can be opened up to third country participation.¹⁷² While, in principle, such programmes are conceived exclusively for member states, the regulations establishing such programmes may allow for third country participation, provided that certain terms and conditions are met. Alternatively, the EU may agree with a third country that it may participate in its programmes. We see this in the EU-UK Political Declaration. Depending on their subject matter, some internal programmes have an external dimension. For example, Horizon 2020 funding (of which this report is a recipient) is open to the participation of specific third countries.¹⁷³ To this end, the EU has signed various several agreements that associate third countries to the Horizon 2020 Programme. It has also concluded general cooperation agreements related to the creation of a European Research Area.

This section examines three such Horizon 2020 agreements with Israel, the Faroe Islands and Switzerland.¹⁷⁴ It is necessary to emphasise that the purpose of each agreement is not to extend EU law to a third country. Rather, it is to open access to a specific EU programme for research entities situated in third countries.¹⁷⁵ That said, in the process of doing this, we can observe aspects of EU law touching upon third countries. For example, each agreement establishes procedures for the European Commission, in accordance with relevant EU law, to conduct audits and on-the-spot checks.¹⁷⁶ While the theme of dispute settlement is not addressed, each agreement establishes a committee to monitor their implementation.¹⁷⁷ As noted, the EU has concluded bilateral science and technology agreements with a number of individual countries.¹⁷⁸ These agreements constitute a framework and a privileged forum to identify common interests, priorities, policy dialogue, and the necessary tools for science and technology collaboration. That said, and similarly to bilateral cooperation agreements, such arrangements do not give rise external DI as defined in the introduction to this report.

¹⁶⁹ Frontex-Albania, Article 7; Frontex-Belarus, Article 7; Frontex-Nigeria, Article 6.

¹⁷⁰ Europol-Albania, Article 8; Eurojust-Georgia, Article 21.

¹⁷¹ Europol-Albania, Article 22; Eurojust-Georgia, Article 24.

¹⁷² European Commission (n 79), 7.

¹⁷³ Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC, [2013] OJ L347/104, Article 7.

¹⁷⁴ Agreement between the European Union and the State of Israel on the participation of the State of Israel in the Union programme 'Horizon 2020 — the Framework Programme for Research and Innovation (2014-2020)', [2014] OJ L177/1 ('Horizon-Israel'); Agreement for scientific and technological cooperation between the European Union and the Faroe Islands associating the Faroe Islands to Horizon 2020, [2015] OJ L35/3 ('Horizon-Faroe Islands'); Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation associating the Swiss Confederation to Horizon 2020, [2014] OJ L370/3 ('Horizon-Switzerland').

¹⁷⁵ Horizon-Israel, Article 1; Horizon-Faroe Islands, Article 1; Horizon-Switzerland, Article 1.

¹⁷⁶ Horizon-Israel, Annex II; Horizon-Faroe Islands, Annex IV; Horizon-Switzerland, Annex III.

¹⁷⁷ Horizon-Israel, Article 5; Horizon-Faroe Islands, Article 4; Horizon-Switzerland, Article 5.

¹⁷⁸ A full list of such agreements is found at <https://ec.europa.eu/research/iscp/index.cfm?pg=countries>. Accessed 5 May 2020.

4. The legal feasibility of external DI

4.1 The legal review of EU external action

The rule of law is a founding value of the EU.¹⁷⁹ Further, the Lisbon Treaty, in setting out the principles of EU external action, confirms its importance as a guiding value.¹⁸⁰ Law plays an important role in how the EU conducts itself on the international stage. This section focuses on the legal limits that may constrain external DI. It adopts a broad understanding of legal feasibility which is taken to mean compatibility with the law that constrains the EU in the exercise of its powers. Accordingly, the object of interest is twofold: (a) the legal limits to external DI that stem from EU law itself or other peripheral sources; and, (b) how such limits may be enforced. EU international agreements have been considered (for a long time) as an integral part of EU law.¹⁸¹ Article 216(2) TFEU provides that international agreements concluded by the EU are binding on its institutions and Member States, which entails such agreements will have primacy over acts of secondary Community and national law.¹⁸² Thus, when the EU concludes an international agreement, it not only binds itself as a matter of international law but also its Member States as a matter of EU law.

The legal review of EU external action has come primarily from its own Courts: the CJEU and General Court (formerly the Court of First Instance). The Courts can examine EU international agreements under various heads of jurisdiction, which, for our purposes, are threefold. First, before an international agreement is concluded, an agreement may be the subject of an Opinion from the CJEU regarding its compatibility with the Treaties.¹⁸³ Second, once an agreement has been concluded and has entered into force, the interpretation of its provisions may form the subject matter of a preliminary ruling.¹⁸⁴ Finally, again post-conclusion, an agreement may be subject to challenge through a direct action for annulment.¹⁸⁵ Other forms of legal review that are less relevant to external DI, which are not addressed here, include claims concerning the EU's non-contractual liability and enforcement actions against Member States.¹⁸⁶ The jurisdiction of EU Courts has impacted (and will undoubtedly continue to) the advancement of the external DI. This has primarily occurred in relation to principle of autonomy and the compatibility of external DI with the EU Charter of Fundamental Rights. Sections 4.2 and 4.3 address each of these limitations.

However, it is not only internal constraints (i.e. those stemming from EU law itself) that may constrain external DI. Rather, constraints may also stem from institutions that are external to the EU. For example, international legal obligations stemming from international treaties or customary international law (CIL) can result in the direct or indirect review of secondary law by EU courts. This form of constraint is more likely to limit unilateral external DI and is therefore examined in that context below. Of greater relevance for our purposes here are international organisations or agreements that establish independent adjudicators to settle disputes arising among Parties, which may include the EU

¹⁷⁹ TEU, Article 2.

¹⁸⁰ TFEU, Article 21(1).

¹⁸¹ This can be traced back to Case C-181/73 *Haegemann v. Belgian State*, ECLI:EU:C:1974:41, Judgment of the Court of 30 April 1974, para 5.

¹⁸² Case C-61/94 *Commission v. Germany*, ECLI:EU:C:1996:313, Judgment of the Court of 10 September 1996, para 52; Case C-308/06 *Intertanko*, ECLI:EU:C:2008:312, Judgment of the Court of 3 June 2008, paras 42-45; Case C-402/05P *Kadi*, ECLI:EU:C:2008:461, Judgment of the Court of 3 September 2008, paras 306-307.

¹⁸³ TFEU, Article 218(11).

¹⁸⁴ TFEU, Article 267.

¹⁸⁵ TFEU, Article 263.

¹⁸⁶ Respectively found in TFEU Articles 268 and 340, and 258.

itself. Article 216(1) and 217 TFEU empower the EU to conclude agreements with international organisations that often maintain their own establish independent adjudicators to settle disputes.¹⁸⁷

A well-known example is the WTO's Dispute Settlement Body ('DSB'). The DSB has authority to establish dispute settlement panels and can authorise the suspension of concessions or obligations if its recommendations are not implemented.¹⁸⁸ The EU and its Member States are members of the WTO in their own right, although it is the European Commission speaks for both. GATT Article XXIV(4) authorises WTO members to establish customs unions and free trade agreements provided certain procedural and substantive requirements have been fulfilled.¹⁸⁹ As the EU is a WTO member, external DI agreements must also satisfy such criteria. Article XXIV gives rise to two forms of review of EU external DI agreements. The first is by the Committee on Regional Trade Agreements (CRTA), responsible for determining whether a notified FTA or customs union meets the substantive criteria of Article XXIV. Second, in instances of conflict, WTO Panels may review an agreement for compatibility. A high-profile example involves the EU's Association Agreement with Turkey. This legal limit is considered in Section 4.4.

4.2 The autonomy of EU law

The origins of autonomy can be traced to the development of the EU legal order itself. The internal face of autonomy describes the relationship between the EU and its Member States, and the degree to which the EU can exercise independent powers. Externally, autonomy refers to the integrity of EU law and its legal order vis-à-vis other international law and other legal orders.¹⁹⁰ For our purposes, it is the external face of autonomy that is relevant. In numerous Opinions, the CJEU has reviewed the compatibility of proposed EU international agreements with the autonomy of the internal EU legal order.¹⁹¹ Here, autonomy is used by the CJEU as a mechanism to protect the internal legal order from destabilising effects that may stem from interactions with international law. How might external DI challenge the autonomy of EU law? As outlined, external DI agreements typically establish an external body to monitor their implementation: the Ankara Agreement establishes an Association Council¹⁹²; operation of the EEA Agreement is monitored by the EFTA Court¹⁹³; the various EU-Switzerland bilateral agreements create Joint Committees.¹⁹⁴ The operation of external bodies such as these are viewed by the

¹⁸⁷ Additionally, Article 220(1) directs the Union to cooperate with specific international organisations: 'The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.'

¹⁸⁸ The settlement of WTO disputes is governed by Annex 2: Understanding on rules and procedures governing the settlement of disputes.

¹⁸⁹ While an equivalent provision is found Article of the GATS, we focus here on the Article XXIV of the GATT because of its longer history.

¹⁹⁰ Jedd Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?', in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018), p. 292.

¹⁹¹ For an overview see *Ibid.*, pp. 297-304.

¹⁹² Association Agreement between Turkey and the EEC, [1963] OJ L/217, Article 25. This is comprised of member states government representatives, the EU and the Turkish government. It has the power, acting unanimously, to take decisions in order to obtain the objectives laid down by the agreement.

¹⁹³ Agreement on the European Economic Area, [1994] OJ L1/3, Article 108 establishes the EFTA Court.

¹⁹⁴ Although EU-Switzerland relations are based on more than 100 bilateral agreements, each agreement has its own Joint Committee. Their role is the management and supervision of the proper functioning of the agreements and are composed of EU and Swiss representatives. A thorough discussion of the institutional framework of the main EU-Swiss agreements is found in Breitenmoser, 'Sectoral Agreements between the EC and Switzerland: Contents and Context', (2003) 40 *Common Market Law Review* 1137, pp. 1153-1158. An exception to the above description is the EC-Switzerland Transport Agreement that provides for the exclusive role of the CJEU to solve disputes concerning decisions of EU institutions made under the agreement.

CJEU as being capable of threatening the autonomy of EU law. There are three ways that external bodies, established by an EU international agreement, can threaten autonomy.

Autonomy may be threatened if an external body can adjudicate on the division of competence, powers or allocation of responsibilities between EU and member states. The Court's concern is that external bodies will affect the balance of power between the EU and its member states. In Opinion 1/91, the CJEU concluded that the EEA Court's capacity to interpret the expression 'Contracting Party' could 'adversely...affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order.'¹⁹⁵ A further example can be found in the Draft Agreement on the accession of the European Union to the ECHR. Article 3 of the Draft Agreement established a co-respondent mechanism that allowed both the EU and a Member State to become parties to ECtHR proceedings. The mechanism was introduced to prevent the ECtHR from ruling on whether the EU or its Member States is the correct party to a case.¹⁹⁶ Nevertheless, the CJEU found that this mechanism is liable to adversely affect the autonomy of EU law: the ECtHR, in certain circumstances, would need to determine whether the conditions of co-respondency were fulfilled, which, according to the Court, would entail an indirect assessment of competence.¹⁹⁷

An external body may threaten autonomy if it disrupts the preliminary reference procedure between the CJEU and the domestic courts of member states. This criterion played an important role in Opinion 1/19, where the Court considered whether the proposed European and Community Patents Court, with jurisdiction to hear actions related to European and Community patents, was compatible with the EU Treaties. The proposed agreement created a separate preliminary ruling mechanism through which the Patent Court could refer questions of EU law to the CJEU. Crucially, this would prevent national courts from referring the same matter to the Court. In the CJEU's eyes, this threatened the autonomy of EU law as 'the tasks [read preliminary ruling procedure] attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.'¹⁹⁸ In Opinion 2/13, the CJEU adopted a similar approach to Protocol No. 16 of ECHR.¹⁹⁹ This enables courts and tribunals of the Contracting Parties to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR. However, given the ECHR would form an integral part of EU law, the CJEU held that the mechanism of Protocol No. 16 could adversely affect the autonomy and effectiveness of the preliminary ruling procedure; specifically, where prior involvement of CJEU would be required, such as when rights guaranteed by the Charter correspond to rights secured by the ECHR.²⁰⁰

Finally, an external body can threaten the autonomy of EU law through its interpretation of EU law. This is perhaps how autonomy is typically thought of; the safeguarding of the CJEU's role as the final arbiter of EU law. This is underpinned by Article 344 TFEU that requires Member States not to submit a dispute concerning the interpretation or application of EU law to any method of dispute settlement other than those provided for in the Treaties. On multiple occasions, the Court has considered the possibility of an external body pronouncing on EU law to threaten its exclusive jurisdiction.²⁰¹

¹⁹⁵ Opinion 1/91, *Accord EEE*, ECLI:EU:C:1991:490, Opinion of the Court of 14 December 1991, paras 34-35.

¹⁹⁶ Jedd Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations', (2016) *EUI Working Paper MWP/2016/17*, p. 9.

¹⁹⁷ Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, Opinion of 18 December 2014, paras 224-225.

¹⁹⁸ Opinion 1/09, *Draft agreement - Creation of a unified patent litigation system*, ECLI:EU:C:2011:123, Opinion of the Court of 8 March 2011, para 85.

¹⁹⁹ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁰⁰ Opinion 2/13, above n. 197, paras. 196-199.

²⁰¹ Opinion 1/09, above n. 198, para. 35; Opinion 1/100, *Proposed agreement on the establishment of a European Common Aviation Area*, ECLI:EU:C:2002:231, Opinion of the Court of 18 April 2002, para. 11; Case C-459/03, *Commission v*

Autonomy was recently considered in Opinion 1/17, where the CJEU examined the compatibility of the Investor Court System (ICS) established by CETA.²⁰² Contrary to the expectations of most observers, the Court found that autonomy is not infringed. Key to this finding was the constrained jurisdiction given to investment tribunals established under the CETA; Article 8.31(2) provides that a tribunal will not have jurisdiction ‘to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party.’ This was sufficient for the CJEU to conclude that the interpretive jurisdiction of a tribunal was limited to the CETA itself.²⁰³ Coupled with the fact the ICS stood outside the EU judicial systems, a CETA tribunal would not have no jurisdiction to interpret or apply EU law.²⁰⁴

This discussion is important for agreements facilitating external DI. Such agreements must make provision for external bodies to monitor the implementation and interpretation of the *acquis communautaire*, the design of which will need to accommodate the discussed elements of autonomy. The approach taken to ICS as found in the CETA suggests a ready-made model is available. That said, the CETA does not qualify as an external DI agreement.²⁰⁵ For external DI agreements involved in the transportation of EU law, a higher standard for compatibility with autonomy is expected. In such agreements, it is the possibility of an external body interpreting EU law that is most likely to conflict with autonomy. A concerted effort has been made across different agreements to respect the CJEU’s role as final arbiter of EU law. The EEA agreement establishes a system of dialogue with EU Courts and allows EFTA states to request an opinion, on a matter of EU law, from the CJEU.²⁰⁶ The possibility of asking the CJEU for its opinion on the interpretation of EU law is found in more recent external DI agreements with Georgia and Ukraine.²⁰⁷ From the perspective of legal review, it is clear the CJEU will typically be engaged by way of an Article 218(11) Opinion before an international agreement comes into effect. However, legal review based on autonomy has also occurred post-conclusion of the agreement by way of actions for annulment under Article 263 TFEU²⁰⁸ or the preliminary reference procedure.²⁰⁹ The consequences of a negative finding concerning autonomy are severe: an agreement will require renegotiation, as was the case with the original EEA Agreement, or will be abandoned, such as the Draft Accession of the EU to the ECHR.

4.3 Compatibility with Charter of Fundamental Rights

The Union is under an obligation to respect fundamental rights as guaranteed by the European Convention on Human Rights, and as they result from the ‘constitutional traditions common to the Member States, as general principles of Community law’, which extends to its external action.²¹⁰ Until relatively recently, the CJEU has appeared reluctant to examine the substantive compatibility of an EU international agreement with EU law. However, in two recent Opinions, given under Article 218(11) TFEU, the Court has expressed a willingness examine whether an agreement complies with the Charter.

Ireland, ECLI:EU:C:2006:345, Judgment of 30 May 2006, para. 123; Opinion 2/13, above n. 197, para. 204; Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, Judgment of 6 March 2018, para. 17.

²⁰² Opinion 1/17, *EU-Canada CETA Agreement*, (Unpublished), Opinion of the Court of 30 April 2019.

²⁰³ *Ibid.*, para. 122.

²⁰⁴ *Ibid.*, para. 136.

²⁰⁵ The CJEU has suggested this, see *Ibid.*, para. 113.

²⁰⁶ EEA Agreement, Articles 106-107. See also Protocol 34.

²⁰⁷ EU-Georgia, Article 267; EU-Ukraine, Article 322(2).

²⁰⁸ Joined Cases C-317 and 318/04 *European Parliament v Council (PNR)*, ECLI:EU:C:2005:190, Order of the Court of 17 March 2005.

²⁰⁹ See *Achmea*, above n. 201.

²¹⁰ TEU, Articles 6(1) and 21(1).

In Opinion 1/15, it considered whether the Agreement on Passenger Name Records (PNR Agreement) complied with Articles 7 (Respect for private and family life) and 8 (Protection of personal data) of the Charter.²¹¹ In Opinion 1/17, it assessed whether Article 47 (Right to an effective remedy and to a fair trial) was undermined by CETA's investor court system. Taken together, the two Opinions demonstrate the willingness of the Court to examine the substance of international agreements in light of the Charter. It is not immediately apparent whether either agreement constitutes an external DI agreement. Previously, we suggested that CETA is not an example of external DI. The same is not the case for the PNR Agreement, which can arguably be considered a weak form external DI agreement, as is explained below.

Directive 95/46/EC aims to protect in the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Article 25(6) of the Directive allows the Commission to recognise the level of data protection of a third country as adequate. Previously, it had negotiated with Canada an agreement on the processing of PNR data, which expired in 2009. The PNR Agreement was subsequently negotiated. The Agreement's aim is to limit the processing of PNR data by Canadian authorities so that it accords with Directive 95/46/EC. Notably, the Preamble of the PNR Agreement explicitly references the Charter. While not requiring relevant authorities to align with the EU standards, the PNR Agreement can be viewed as an example of the EU lifting third-country standards to ensure equivalence with its own requirements. Viewed from this perspective, the PNR agreement can be seen as a loose form of external DI. Opinion 1/15 therefore makes clear that the substance of an agreement should be Charter compliant. In terms of legal feasibility, a finding of incompatibility are stark: in Opinion 1/15, the Court held that the PNR Agreement could not be concluded because it was not compliant with the Charter.²¹²

4.4 Compatibility with GATT Article XXIV(4)

The importance of international law is expressed in Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to...the strict observance and the development of international law, including respect for the principles of the United Nations Charter.' Subsequent articles of the TEU²¹³ together with judgments of the CJEU to the effect that international law is an 'integral part of EU law', emphasise the EU's commitment to international law.²¹⁴ International legal obligations of the EU may arise from various sources, in particular customary international law and treaty law. As explained above, we consider the former to be of greater relevance to unilateral external DI. Consequently, the focus of this section is how obligations stemming from the EU's membership of the WTO may restrict its capacity to conclude external DI agreements.

GATT Article XXIV provides an exception to the WTO obligation of most-favoured-nation for the formation customs unions and FTAs.²¹⁵ The Article contains two obligations for proposed PTAs of WTO members: (a) an obligation not to raise the overall level of protection and make access for products and services from non-participating WTO members more difficult; and (b) an obligation to liberalise substantially all trade among members of the PTA. As noted, both the EU and its member states are party to the WTO. Accordingly, it is against these substantive criteria that EU agreements facilitating

²¹¹ European Commission, Proposal for a Council decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, COM(2013) 528 final.

²¹² Briefly, the CJEU's reasoning for this finding was that the PNR Agreements did not adequately respect the Articles 7 (respect for private and family life), 8 (protection of personal data) and 52(1) (scope of limitations of rights) of the Charter.

²¹³ See TEU, Article 21.

²¹⁴ *Haegeman v. Belgium*, above n. 181, para 5; Case 104/81 *Kupferberg v Hauptzollamt Mainz*, ECLI:EU:C:1982:362, Judgment of the Court of 26 October 1982, para 13; *Intertanko*, above n. 182, para 38.

²¹⁵ While our focus remains the stated GATT provision, it should be noted that an equivalent provision is found in Article V of the WTO's General Agreement on Trade in Services (GATS).

external DI may be subject to legal review. Rather than address each of the two substantive criteria, we instead focus on the two forms of legal review to which such agreements may be subject.²¹⁶

The first form of review is by the WTO's CRTA. Pre-formation of a customs union or FTA, WTO members must notify the relevant committee. For agreements in goods, members must notify the Committee for Trade in Goods, and, for agreements in services, they must notify the Council on Trade in Services. The EU has notified 43 agreements to WTO, several of which are external DI agreements, including the EEA Agreement and EU-Turkey Association Agreement.²¹⁷ On notification, the agreement in question is referred to the CRTA for examination with the substantive requirements of Article XXIV.²¹⁸ The CRTA has a broad mandate to 'carry out the examination of [an FTA or customs union]...and thereafter present [a] report to the relevant body for appropriate action' and direct the Committee to 'consider the systemic implications for such [PTAs] and regional initiatives for the multilateral trading system.'²¹⁹ While Article XXIV:7(a) appears to require notification (and review) before formation of an agreement, the reality is that most notifications take place once an agreement is in place. Accordingly, review by the CRTA tends to take place post-completion of an agreement. It is open to the CRTA to conclude that an agreement is not compatible with Article XXIV and recommend its modification.²²⁰ Additionally, Article XXIV:7(b) states 'parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.' However, given the CRTA operates according to consensus, a negative determination has not been given.

The second form of review is by WTO panels, subject to appeal on points of law to the Appellate Body. This form of review differs as it can take place only where the formation of an FTA or customs union is used to defend an infringing measure. In those circumstances, the Appellate Body has confirmed that WTO panels will have jurisdiction to assess the overall compatibility of PTAs with the substantive requirements of Article XXIV.²²¹ The Understanding on Article XXIV confirms the jurisdiction of WTO panels and appellate bodies to review claims involving the formation of FTAs or customs unions.²²² A relevant example involves the EU-Turkey Association Agreement. By virtue of Decision 1/95, Turkey committed to 'align itself with the EC preferential customs regime' and apply 'substantially the same commercial policy at the Community' in the textile sector.²²³ Pursuant to these commitments, Turkey imposed quantitative restrictions on imports of Indian textiles. When challenged at the WTO, Turkey sought to justify the quantitative restrictions by way of GATT using Article XXIV. The Appellate Body accepted the Article could justify an inconsistent measure provided Turkey prove (1) the existence of a customs union and (2) the formation of a customs union would be prevented if it were not able to

²¹⁶ For further clarity, the decision not to address either of the substantive criteria is their focus relates to matters of little relevance to external DI (i.e. tariffs).

²¹⁷ WTO (2019) Regional Trade Agreement Database. <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>. Accessed 19 February 2019.

²¹⁸ WTO, 'Understanding on the Interpretation of the Article XXIV of the GATT' (1994), p. 9. While review by the CRTA is mandatory for agreements in goods, it is optional for those in services. See GATS, Article V:7(a).

²¹⁹ General Council, 'Committee on Region Trade Agreements', Decision of 6 February 1996, WT/L/127, paras 1(a) and (d).

²²⁰ Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Hart Publishing, 2018) 341.

²²¹ Report of the WTO Appellate Body, *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 22 October 1999, paras 58-60.

²²² WTO, 'Understanding on the Interpretation of the Article XXIV of the GATT', above n. 218, 6.

²²³ Decision 1/95, Articles 12 and 13.

introduce the measure in question.²²⁴ The Appellate Body rejected this argument and Turkey was required to revise its textile arrangements in line with WTO law.²²⁵

The above overview shows that external DI agreements may be subject to two forms of WTO legal review. This review will assess the compatibility of those agreements with the substantive criteria of Article XXIV. This is relevant for those agreements qualifying as either as a customs union or an FTA. Other external DI agreements, such as MRAs, will not be subject to such review. The first form, review by the CRTA, will almost certainly be undertaken. However, as discussed above, it would seem unlikely that the CRTA would conclude an external DI agreement to be incompatible with Article XXIV. Given the consensus requirement, the EU would have to vote against the compatibility of its own external DI agreement which is an unlikely scenario. Review by a WTO panel will only arise when another WTO member challenges an external DI agreement. The case of *Turkey-Textiles* serves as a relevant example. The case demonstrates how the conclusion of an external DI agreement may be affected by a negative WTO decision.

5. Conclusions

At the outset, Part II of this report had two aims. First, to construct an analytical framework for the legal examination of external DI and thereafter map its ranging landscape. Sections 2 and 3 addressed this aim. Refashioning the work of Abbott et al., Section 2 established a framework situated around three dimensions of (a) obligation, (b) precision and (c) delegation. Each dimension was tailored for the examination of external DI. Section 3 then used this framework to examine and compare the various legal used by the EU in its international agreement to facilitate external DI. The results of the mapping clearly demonstrated that the EU facilitates external DI through a wide variety of mechanisms that are both fact and scenario dependent. The second aim of Part II was to identify the legal constraints that may restrict the advancement of external DI. Section 4 identified various legal means through which external DI may be restricted. The most important mode of review comes via the EU Courts. As demonstrated, there are various means through which such review can take place, namely: advisory Opinions under Article 218(11) TFEU, direct actions for annulment, and judgments pursuant to preliminary references. The section highlighted various grounds on which these forms of review may be based. Of those highlighted, the principle of autonomy looms large having previously scuppered various EU international agreements. Aside from review by EU Courts, the discussion identified the important role of GATT Article XXIV that lays the basis for review by the WTO's CRTA and, when necessary, panels.

²²⁴ Report of the WTO Appellate Body, *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 22 October 1999, para. 58.

²²⁵ *Ibid.*

Part III: Unilateral external differentiation

As was noted in the introduction to this report, we distinguish here between ‘legal alignment’ and ‘conduct-related’ unilateral external differentiation. In this part of the report, we will describe and exemplify these two forms of unilateral external differentiation, before analyzing their legal feasibility and constitutional acceptability. As we also stated in the introduction, external differentiation will be considered to be unilateral when it results from the adoption of an internal EU act such as a regulation or directive; again bearing in mind that unilateralism is a spectrum concept rather than a fixed point on a scale.²²⁶ In order to situate our discussion of unilateral external differentiation in the existing legal literature, it may be helpful to observe that this phenomenon arises when the EU adopts legal acts which are extraterritorial in nature or which give rise to ‘territorial extension’.²²⁷

1. Unilateral external differentiation: legal alignment

Legal alignment unilateral external differentiation arises when EU law establishes a framework for assessing whether third country law is sufficiently aligned with that of the EU. This practice is relatively common in EU law. Examples are found in diverse areas such as banking and financial regulation,²²⁸ data protection,²²⁹ food safety,²³⁰ aviation security,²³¹ and climate change.²³² As noted above, unilateral measures of this kind promote alignment between EU and third country law. As is sometimes the case with the international agreements discussed above,²³³ the concept of ‘equivalence’ typically provides the benchmark in unilateral acts for assessing whether an appropriate degree of alignment has been achieved. While the precise wording of equivalence clauses included in EU legislation varies, equivalence is normally judged by reference to the capacity of third country law to satisfy particular requirements laid down in EU legislation, or to achieve a level of protection equivalent to that of the EU in relation to a specified objective. Occasionally, EU legislation references a standard other than equivalence to guide the evaluation of third country law. As we will see below, the General Data Protection Regulation (GDPR) permits data transfers to third countries which have been recognized as ensuring an ‘adequate level of protection’.²³⁴

²²⁶ Article 288 TFEU. Bodansky, above n. 4. We noted there that the degree of unilateralism inherent in a measure does not only depend on its legal form, but also on whether the objective(s) pursued by it, and the standards and enforcement mechanisms included within it, have been drawn up unilaterally or find support in instruments that have been multilaterally agreed.

²²⁷ Scott n. 2 above. Legal-alignment unilateral external DI corresponds to the concept of country-level territorial extension, while conduct-related DI corresponds with the concept of transaction-level territorial extension.

²²⁸ For an indication of the plethora of such measures in banking and financial services see the Commission’s page on ‘equivalence’ in this area: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en. Twelve instruments are listed here.

²²⁹ Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, <http://data.europa.eu/eli/reg/2016/679/oj>.

²³⁰ Regulation 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, Article 120, <http://data.europa.eu/eli/reg/2017/625/oj>.

²³¹ Article 4(3)(3), Regulation 300/2008 on common rules in the field of civil aviation security and Part E, <http://data.europa.eu/eli/reg/2008/300/oj>, Commission Regulation 272/2009 supplementing the common basic standards on civil aviation security, <http://data.europa.eu/eli/reg/2009/272/oj>.

²³² Directive 2003/87 establishing a greenhouse gas emission trading scheme, Article 25a read in light of recital 17, <http://data.europa.eu/eli/dir/2003/87/oj>.

²³³ See the discussion in Section 3.3 in Part II above.

²³⁴ GDPR, above n. 229, Article 45.

The importance of a third country demonstrating alignment between EU law and third country law varies between different measures. In its strongest form, measures of this kind make access to the EU market conditional on a third country demonstrating that it has attained the requisite degree of legal alignment. For example, for food products of animal origin to be imported into the EU, a third country *must* be included on an EU list of authorized third countries.²³⁵ In order to be authorized, a third country must demonstrate that it complies with the requirements laid down in EU law or offers an equivalent animal health guarantee.²³⁶ In making this assessment, account will be taken of the legislation of the third country, as well as the means at the disposal of its services to apply this legislation effectively.²³⁷

More commonly, however, EU legislation will set out different pathways to achieve compliance with EU law, with legal alignment constituting one among several compliance pathways. An example will help to clarify this point. The EU's General Data Protection Regulation (GDPR) permits the transfer of personal data to a third country for processing either where the third country in question has an adequate level of data protection in place (legal alignment); or where the data controller can show in a different way that personal data will be adequately protected by the recipient. In the absence of legal alignment, an adequate level of data protection can be achieved by 'appropriate safeguards' or 'binding corporate rules'.²³⁸ However, where alternatives to legal alignment exist within a single instrument, they are frequently burdensome for third country entities seeking access to the EU market. For example, by contrast to an adequacy determination, reliance on certain types of 'appropriate safeguards' in the context of data protection will require authorization of specific data transfers by the competent supervisory authority.²³⁹ Similarly, in banking and financial regulation, EU recognition of the equivalence of EU and third country law will often serve to mitigate the burden on financial institutions of being required to comply with overlapping or conflicting norms.²⁴⁰

Legal alignment is often recognized by way of an equivalence decision. Such decisions normally take the form of implementing or delegated acts and they are unilateral decisions adopted by the Commission.²⁴¹ In adopting an equivalence decision, the Commission is required to follow the procedure laid down in the basic act. However, as we will discuss below in examining the enforcement of EU legislation giving rise to unilateral external differentiation, in practice, such decisions require intensive and continuing cooperation with third country regulatory authorities.

2. Unilateral external differentiation: conduct-related

Counter-intuitive though it may initially appear, it is relatively common for EU legislation to be drafted or interpreted in a way that renders it applicable to conduct that takes place outside of the EU. We labelled this conduct-related unilateral external differentiation in the introduction to this report. As was noted there, we consider that conduct-related unilateral external differentiation arises when the EU

²³⁵ Article 8(1), Council Directive 2002/99, <http://data.europa.eu/eli/dir/2002/99/oj> laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption. Also, Article 3(b)(i) and Annex II, Commission Decision 2005/432/EC, <http://data.europa.eu/eli/dec/2005/432/oj>.

²³⁶ Article 7, *ibid*

²³⁷ *Ibid*, Article 8(1)(a) & (b). See also Article 120(a), Regulation 2017/625, n. 230 above, which allows the Commission to perform controls in third countries to 'verify the compliance or equivalence of third-country legislation and systems'.

²³⁸ GDPR, above n. 229, Article 45 (transfers subject to appropriate safeguards) and Article 46 (binding corporate rules).

²³⁹ GDPR, above, n. 229, Article 46(2). No authorization is required in respect of the appropriate safeguards included in Article 46(1).

²⁴⁰ See, e.g. Article 13 Regulation 624/2002 on OTC derivatives, central counterparties and trade repositories (EMIR), <http://data.europa.eu/eli/reg/2012/648/oj>, laying down an equivalence based mechanism to avoid duplicative or conflicting rules.

²⁴¹ Some EU legislation also provides for the possible conclusion of equivalence agreements with third countries. See eg Article 20, Regulation 300/2008 concerning aviation security, above n. 231.

regulator is required, as a matter of law, to take foreign conduct into account when assessing whether a natural or legal person has complied with obligations laid down in EU law. We offer two examples of this kind of unilateral external differentiation below.

First, in 2009 the EU enacted a regulation laying down rules for the killing of animals that are bred for the production of food, wool, skin, fur or other products.²⁴² This provides that '[a]nimals shall be spared any avoidable pain, distress or suffering during their killing and related operations'.²⁴³ They 'shall only be killed after stunning and the loss of consciousness and sensibility shall be maintained until the death of the animal'.²⁴⁴ As a consequence, the regulation applies directly to the killing of animals outside of the EU in so far as the animal products are imported into the EU. For an EU competent authority to make an assessment of whether imported products comply with the regulation, it is required, as a matter of law, to ascertain whether foreign conduct – namely the manner in which animals have been killed in a third country – is compliant with EU law. Where animals have been killed in a manner that is not compliant, animal products may not lawfully be imported into the EU.

Second, in 2008 the EU enacted a directive including international aviation within the scope of the EU's greenhouse gas emissions (GHG) trading scheme (GHG aviation directive). This required aircraft operators to surrender greenhouse gas (GHG) emission allowances to cover each tonne of CO₂ emitted during the course of flights taking off from, or landing at, an EU airport.²⁴⁵ This requirement was subject to a possible exemption for flights arriving from third countries which had been recognized as having adopted EU-equivalent measures to reduce the climate change impact of flights to the EU.²⁴⁶ As in the data protection example above,²⁴⁷ this directive therefore combined two forms of unilateral external differentiation; conduct-related (applying to aircraft operators) and legal alignment (assessing the equivalence of third country law).

On a flight from San Francisco to London, only 9% of the GHGs emitted occur within the territory or airspace of an EU Member State.²⁴⁸ The rest are generated in the territory or airspace of a third country, or in areas beyond national jurisdiction such as the airspace above the High Seas. While the economic instrument relied upon in this directive does not directly 'regulate' foreign conduct in the same way as the EU regulation on animal killing,²⁴⁹ it nonetheless falls within the scope of our definition of conduct-related unilateral external differentiation. This is because, subject to the granting of a legal alignment exemption, it would not be possible for an EU competent authority to verify that an aircraft operator has surrendered sufficient GHG emission allowances to comply with the directive without taking foreign conduct in the form of extraterritorial GHG emissions into account. This example has proved to be controversial and the directive in question has formed the subject matter of a validity challenge heard by the European Court.²⁵⁰ We will return to this example below when addressing issues of legal feasibility and constitutional acceptability.

²⁴² Regulation 1099/2009, above n. 235.

²⁴³ Ibid, Article 3(1).

²⁴⁴ Ibid, Article 4(1).

²⁴⁵ Directive 2008/101 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, <http://data.europa.eu/eli/dir/2008/101/oj>.

²⁴⁶ Ibid, Article 25a.

²⁴⁷ GDPR, above n. 229.

²⁴⁸ See Joanne Scott & Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469.

²⁴⁹ Above n. 235.

²⁵⁰ Case C-366/10, *Air Transportation of America & Others v. Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864.

There are many examples of conduct-related external differentiation in EU law and they are found across a wide range of different policy areas.²⁵¹ We see prominent examples in criminal law,²⁵² transport,²⁵³ climate change,²⁵⁴ environmental protection,²⁵⁵ banking and financial services²⁵⁶ and competition law.²⁵⁷ It is almost invariably the case that the EU uses the ‘carrot’ of market access to encourage actors to demonstrate that foreign conduct is in conformity with EU law.

3. Legal feasibility

As was noted in Part II of this report, we adopt a broad understanding of legal feasibility to mean compatibility with legal requirements that constrain the EU in the exercise of its power. We are thus interested in (a) the legal limits to external DI that stem from EU law itself, including public international law to the extent that this is binding on the EU and, (b) how such limits may be enforced. As in relation to international agreements, the legal review of EU acts giving rise to unilateral external differentiation has come primarily from the EU Courts, namely the CJEU and the General Court.

In assessing the legal feasibility of unilateral external differentiation, we will examine the relevant case law of the CJEU. This includes preliminary rulings relating to the interpretation or validity of an act of the EU institutions as well as direct actions for annulment (i). We will also explore the possible tension between unilateral external differentiation and enhanced cooperation, as exemplified by the *United Kingdom’s* legal challenge to the Council Decision authorizing enhanced cooperation relation to the financial transaction tax (ii). Finally, we consider possible constraints arising under WTO law (iii) and discuss issues relating to the feasibility of enforcing measures giving rise to unilateral external differentiation (iv). As we noted in the introduction to this report, in so far as the norms constraining unilateral external differentiation are considered to be constitutional in nature, there is an overlap between considerations of legal feasibility and constitutional acceptability.

3.1 Unilateral External Differentiation and the CJEU

The CJEU has been willing to review the validity of EU legislation in light of its compatibility with customary international law, including customary international law principles relating to the exercise of legislative competence known as prescriptive jurisdiction.²⁵⁸ At its most basic level, customary

²⁵¹ Many examples are discussed in more detail in other publications by one of the authors of this report. See Scott, n. 2 above. Also, ‘The New EU “Extraterritoriality”’ (2014) 51 CMLR 1343 and ‘The Global Reach of EU Law’ in Marise Cremona & Joanne Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, 2019).

²⁵² E.g. Article 10, Directive 2011/36 on preventing and combatting trafficking in human beings and protecting its victims, <http://data.europa.eu/eli/dir/2011/36/oj>. Also, Article 17, Directive 2011/92 on combating the sexual abuse and the sexual exploitation of children and child pornography, <http://data.europa.eu/eli/dir/2011/92/oj>.

²⁵³ As with the directive including aviation in the EU ETS (n. 232 above), this includes an exception for third countries that have been recognized as applying security standards equivalent to those of the EU. See Section 6.8 Annex to Commission Implementing Regulation 2015/1998 laying down detailed measures for the implementation of the common basic standards on aviation security, (Annex, Point 6.8.2.4), http://data.europa.eu/eli/reg_impl/2015/1998/oj.

²⁵⁴ See Article 29, Directive 2008/101 on the promotion of the use of energy from renewable sources, <http://data.europa.eu/eli/dir/2008/101/oj>, which sets out both legal alignment obligations for third countries and conduct-related sustainability criteria for imported biofuels.

²⁵⁵ Waste exports constitute a prominent example in this respect. For a typical example see, Article 10(b) Directive 2012/19 on waste electrical and electronic equipment, <http://data.europa.eu/eli/dir/2012/19/oj>.

²⁵⁶ There are multiple examples in this area of law. For an overview of the extraterritorial reach of EU financial services regulation see: <https://www.lw.com/admin/Upload/Documents/Extraterritorial-Effect-EU-Financial-Services-Legislation.mbs.pdf> and concretely by way of example, Article 4(1)(a)(v), EMIR, n. 240 above.

²⁵⁷ E.g. Regulation 139/2004 on the control of concentrations between undertakings, <http://data.europa.eu/eli/reg/2004/139/oj>

²⁵⁸ For a recent example, see *ATAA*, above n. 250, and the discussion in Part III(d) below.

international law requires the exercise of prescriptive jurisdiction to be based on the existence of a ‘genuine connection between the subject matter of the jurisdiction and the territorial base or reasonable interests of the state in question [or the EU]’.²⁵⁹ A genuine connection can be demonstrated by relying on one of the heads of jurisdiction recognized by customary international law. This includes the territorial principle, the personality (nationality) principle, the protective principle and, in narrowly constrained circumstances, universal jurisdiction’.²⁶⁰ As we will see below, the ‘effects doctrine’ is also increasingly viewed as a valid basis for exercising prescriptive jurisdiction.

The EU has drawn on a wide range of connecting factors in adopting legislation giving rise to unilateral external differentiation, including territory, nationality and effects.²⁶¹ Whenever the Commission adopts a legislative proposal, it must select jurisdictional ‘triggers’ to define the scope of application of the law. For example, if it selects nationality as a jurisdictional trigger, the law will apply to all EU citizens. If it selects habitual residence as a jurisdictional trigger, the law will apply to a differently circumscribed group, namely all persons who are habitually resident in the EU. When reading EU legislation, it is crucial to pay careful attention to the precise nature and contours of these jurisdictional triggers because they play a key role in distributing the burden of complying with EU law and in allocating rights and other benefits.

Some of the jurisdictional triggers included in EU legislation are well established and uncontroversial. This is the case, for example, when the EU relies on a nationality trigger which serves to bring EU citizens or EU-established corporations within the scope of application of EU law. Likewise, when it relies on a territorial trigger which serves to bring conduct within the EU, or persons present within the EU, within the scope of EU law. Other jurisdictional triggers are more novel and/or controversial and sometimes it may even be difficult to identify which head of jurisdiction they fall under. For example, the EU sometimes includes an ‘anti-evasion’ trigger which renders EU law applicable where this is necessary or appropriate to prevent evasion of the relevant law;²⁶² or a counterparty principle which makes EU law applicable to foreign nationals which enter into a contract with an entity that is established within the EU.²⁶³

So far, the CJEU has adopted a permissive stance when confronting the phenomenon of unilateral external differentiation (although the Court has not labelled the phenomenon as such). We will explore the Court’s approach below as well as highlighting some areas of continuing uncertainty. Before doing so, however, it is pertinent to observe that notwithstanding its permissive stance, the CJEU has where possible construed measures giving rise to unilateral external differentiation in a manner that is intended to facilitate the peaceful co-existence of EU and third country law. In particular, it has been attentive to the importance of avoiding situations in which natural or legal persons may be faced with having to comply with conflicting legal requirements emanating from two or more legal orders.

For example, notwithstanding the EU’s ban on the testing of cosmetics products on animals, products that have been tested on animals in a third country in order to satisfy regulatory requirements imposed by that third country, can still be lawfully imported into the EU so long as the data generated by this animal testing has not been used to demonstrate the safety of the cosmetics products under EU law.²⁶⁴

²⁵⁹ James Crawford, Brownlie’s Principles of Public International Law (OUP, 9th ed. 2019) p. 440.

²⁶⁰ For a good overview see *ibid.*, and *Restatement of the Law Fourth: The Foreign Relations Law of the United States* (American Law Institute, 2020), §407 (4th Restatement).

²⁶¹ See in particular Scott, ‘The New EU “Extraterritoriality”’, above n. 251.

²⁶² EMIR, above n. 240, Article 4(1)(a)(v).

²⁶³ *Ibid.*

²⁶⁴ Case 592/14, *European Federation of Cosmetics Ingredients v. Secretary of State for Business, Innovation and Skills and Attorney General*, para. 43, ECLI:EU:C:2016:703. See also Case C-424/13 *Zuchtvieh-Export GmbH*, para.54, ECLI:EU:C:2015:259, where the CJEU read a ‘conflict equivalence’ clause into the relevant legislation, by finding that where ‘the law or administrative practice of a third country...verifiably and definitely precludes full compliance with [EU

In this way, a manufacturer of cosmetics products is not obliged to choose between producing for the EU market *or* for a third country market.

The CJEU's permissive stance to unilateral external differentiation may be illustrated first by examining case law concerning measures which rely on a territorial connection. In this respect, the CJEU's most famous judgment is in the *Air Transportation of America* case.²⁶⁵ Here, in assessing the validity of the EU directive including extraterritorial GHG emissions within the scope of the EU's emissions trading scheme (GHG aviation directive), the CJEU emphasized that the directive only applies to aircraft operators performing a flight that arrives at, or departs from, an EU airport. Therefore, the aircraft in question 'are physically in the territory of one of the Member States of the European Union...[they] are thus subject on that basis to the unlimited jurisdiction of the European Union'.²⁶⁶

When the CJEU considered that aircraft operators could be required to surrender emissions allowances to cover extraterritorial GHG emissions, it insisted that it is permissible for the EU to make the conduct of a commercial activity within its territory conditional upon operators complying with EU law. It states that this is 'in particular' the case when the objectives pursued by EU law 'follow on from an international agreement to which the European Union is a signatory such as the [UNFCCC] and the Kyoto Protocol'.²⁶⁷ Further, in justifying the 'full applicability' of EU law within the territory of the EU Member States, even as regards conduct that occurs partly outside the EU, the CJEU observed that the relevant foreign conduct is capable of causing pollution within the EU.²⁶⁸

There is, therefore, a degree of ambiguity in the CJEU's judgment. Would the existence of a strong territorial connection (planes landing at and taking off from EU airports) have been sufficient to justify the inclusion of foreign conduct within the scope of EU law even in the absence of evidence that the relevant foreign conduct could generate negative effects within the EU? In a recent case, however, the CJEU exhibited a willingness to interpret EU legislation as including foreign conduct within its scope, even in the absence of any suggestion that the conduct in question would cause negative effects within the EU. In the *Zuchtvieh* case, the CJEU accepted that animal welfare requirements included in EU legislation could apply to animal transportation operations outside the EU, in so far as the journey had commenced within the EU.²⁶⁹

While the CJEU has adopted a broad interpretation of the territorial principle, it has also more recently recognized the compatibility of the effects doctrine with public international law. While the 4th Restatement of US Foreign Relations Law states that '[i]nternational law recognizes a state's jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory',²⁷⁰ other commentators adopt a position that is more circumspect. Crawford observes, for example, that this doctrine is controversial but 'not objectionable in all cases'.²⁷¹ He argues that the validity of the effects doctrine remains uncertain except in relation to certain criminal offences and that this uncertainty is present also in the area of competition law.²⁷²

law], Member State competent authorities may 'accept realistic planning for transport' which 'indicates that the planned transport will safeguard the welfare of the animals at a level equivalent' to EU law.

²⁶⁵ *ATAA*, above n. 250.

²⁶⁶ *Ibid.*, para. 125.

²⁶⁷ *Ibid.* & para. 128.

²⁶⁸ *Ibid.*, para. 129.

²⁶⁹ *Zuchtvieh*, above n. 264.

²⁷⁰ 4th Restatement, above n. 260, §409. It notes that the doctrine has been controversial in the past but that it has achieved a wider degree of acceptance over time. It recognizes that some states continue to object to it in particular cases (409(b)).

²⁷¹ Crawford, above n. 259, p. 447.

²⁷² *Ibid.*

Be this as it may, the CJEU has endorsed a ‘qualified effects test’ in the area of EU competition law,²⁷³ upholding the judgment of the General Court that ‘the qualified effects test allows the extraterritorial application of EU competition law where it is foreseeable that the [foreign] conduct in question will have an immediate and substantial effect in the European Union’.²⁷⁴ The European Court had previously favoured an ‘implementation test’ which permitted the exercise of jurisdiction over anticompetitive agreements that were concluded abroad but implemented within the EU.²⁷⁵ In endorsing the qualified effects test, the CJEU noted that it is intended to serve the same objective as the implementation test, namely to prevent ‘conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market’.²⁷⁶ Although the CJEU has not yet ruled on the compatibility of the effects doctrine with customary international law in other policy domains, including banking and financial services regulation, it seems highly likely that it would adopt a similarly permissive approach.

Despite these developments, uncertainties remain in defining the outer limits of the EU’s competence in adopting measures giving rise to unilateral external differentiation.

First, the CJEU has not yet had an opportunity to rule on the lawfulness of legal alignment unilateral external differentiation, where compliance with EU law depends on the content of third country law. It has nonetheless interpreted legislation containing a legal alignment obligation in a robust and far-reaching way. In *Schrems*, in interpreting the ‘adequacy’ requirement in the GDPR, the Court stated that while a third country cannot be required to ensure a level of protection which is identical to the EU, it must ensure ‘a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union’.²⁷⁷ While ‘the means’ used by the third country in question to ensure this level of protection ‘may differ’ from those used by the EU, ‘those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within [the EU]’.²⁷⁸ Applying this standard, the European Court has annulled both the Commission’s ‘Safe Harbor’ and ‘Privacy Shield’ Decisions for wrongly concluding that the United States ensures an adequate level of data protection for this purpose.²⁷⁹

Second, there have been occasions when the EU appears to push at the outer boundaries of established heads of jurisdiction. We see an example of this in the EU’s regulation of bankers’ bonuses after the financial crisis.²⁸⁰ Here, the EU sought to limit the bonuses payable to certain categories of staff employed by banks and investment firms. The limitations introduced by the EU were applicable at ‘group, parent company and subsidiary level’, including in relation to those employed in third country subsidiaries of entities established in the EU. While the personality (nationality) principle permits a state to exercise jurisdiction with respect to ‘the conduct, interests, status and relations of its national abroad, which include natural persons and corporations’,²⁸¹ it is highly unlikely that this extends to the foreign

²⁷³ Case C-413/14 P, *Intel Corporation Inc. v. Commission*, judgment of 6th September 2017.

²⁷⁴ *Ibid.*, para. 49, ECLI:EU:C:2017:632.

²⁷⁵ Case 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström Osakeyhtiö and Others v Commission*, para. 16, EU:C:1988:447.

²⁷⁶ *Intel* above n. 273, para. 45.

²⁷⁷ Case C-362/14, *Schrems v. Data Protection Commissioner*, para. 73, ECLI:EU:C:2015:650.

²⁷⁸ *Schrems*, *ibid.*, para. 74.

²⁷⁹ *Ibid.*, para. 104, and *Data Protection Commissioner, Facebook Ireland and Maximilian Schrems v. The United States of America*, para. 198.

²⁸⁰ Article 94(1)(g), Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, <http://data.europa.eu/eli/dir/2013/36/oj>.

²⁸¹ 4th Restatement, above n. 260, §410(a).

incorporated subsidiaries of EU firms.²⁸² Although the United Kingdom launched an action for annulment in relation to the bankers' bonuses cap,²⁸³ it withdrew its legal challenge following the release of an unsympathetic Advocate General's Opinion.²⁸⁴ While the Advocate General acknowledged the existence of the personality (nationality) principle in customary international law, he did not explore its scope.²⁸⁵

Third, doubts have been expressed about the compatibility with customary international law of what may be considered to be novel jurisdictional triggers. We saw a stark illustration of this in relation to the Commission's (unadopted) proposal for a financial transaction tax.²⁸⁶ Here, the United Kingdom objected to the inclusion of the so-called counterparty principle and issuance principle as heads of jurisdiction for levying the tax²⁸⁷. The counterparty principle would have rendered a third country entity entering into a financial transaction with an EU-established entity liable for the tax.²⁸⁸ The issuance principle would have rendered a third country entity dealing in financial instruments issued within the EU liable for the tax.²⁸⁹ For example, if a U.S. and Hong Kong bank were to enter into a transaction involving Volkswagen shares, each of these banks would incur liability for the tax. This would remain the case regardless of where in the world the transaction took place.

Although the CJEU has not ruled on the compatibility of these novel jurisdictional triggers with customary international law,²⁹⁰ the Commission appears to be walking on shaky ground in its proposal for a transaction tax. The Commission's claim that '[a]s in existing EU legislation in the area of indirect taxes, territoriality principles are fully respected' is not self-evidently true.²⁹¹ When a third country entity enters into a transaction outside of the EU with a counterparty established in the EU, or involving a financial instrument issued in the EU, that third country entity is entering into a transaction with a person or property with a territorial connection to the EU. However, the third country entity itself can only be considered to have an indirect territorial connection with the EU.

In relation to its proposal for a financial transaction tax, the Commission laid emphasis on two other elements within it to support its claim that 'territoriality principles' were fully respected. First, it explained that the issuance principle should be seen as a principle of last resort which is intended 'to improve the resilience of the system against relocation'.²⁹² The Commission noted that this principle would make it 'less advantageous to relocate activities and establishments outside the FTT

²⁸² See the discussion in Cedric Ryngaert, *Jurisdiction in International Law* (OUP, 2nd ed. 2015) p. 108 where he concludes that the exercise of extraterritorial jurisdiction over foreign subsidiaries (as opposed to branches) is generally not considered to be in line with the nationality principle, even where the foreign subsidiary is controlled by a domestic parent corporation. Even the EU has recognized in other areas that foreign subsidiaries are subject to the law of the place in which they are incorporated (see European Commission, Guidance Note Questions and Answers; adoption of an update on the Blocking Statute' (2018) OJ C277 I/4 question 21).

²⁸³ Case 507/13, *United Kingdom and Northern Ireland v. European Parliament and Council of the European Union*, ECLI:EU:C:2014:2481.

²⁸⁴ *Ibid*, Opinion of Advocate General Jääskinen, ECLI:EU:C:2014:2394

²⁸⁵ *Ibid*, para. 38.

²⁸⁶ COM(2013) 71 final, Proposal for a Council Directive implementing enhanced cooperation in the area of a financial transaction tax (2013 Proposal). For an earlier version of this proposal see COM(2011) 594 final, Proposal for a Council Directive on a common system of financial transaction tax.

²⁸⁷ Case C-209/13, *United Kingdom and Northern Ireland v. Council*, ECLI:EU:C:2014:283.

²⁸⁸ 2013 Proposal, above n. 286, Article 4(1)(f).

²⁸⁹ 2013 Proposal, above n. 286, Article 4(1)(g).

²⁹⁰ For reasons we will discuss below, the CJEU did not rule on the lawfulness of relying on these novel jurisdictional triggers.

²⁹¹ 2013 Proposal, above n. 286, p. 11. The Council Legal Service did not agree. See Council of the European Union, 'Opinion of Legal Service: Proposal for a Council Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax' (Interinstitutional File, 2013/0045).

²⁹² 2013 Proposal, above n. 286.

jurisdictions'.²⁹³ That may be so, but the Commission did not explain how or on what basis this should be viewed as somehow strengthening the territorial connection upon which the issuance principle is said to be based. Second, the Commission pointed to the fact that the proposal contained a 'general rule' which would have exempted entities from liability under the tax where there is 'no link between the economic substance of the transaction and the territory of any participating Member State'.²⁹⁴ Not only does this general rule place the burden of proof on the entity seeking exemption, but no further guidance was offered to indicate the kinds of situations in which this exemption might apply.

None of this is to suggest that there may not be circumstances in which the EU is justified in extending its regulatory or tax jurisdiction to entities and activities outside of the EU. However, when the EU relies on novel jurisdictional triggers, it is incumbent upon it to explain more clearly why it has a legitimate interest in extending its jurisdiction in this way. We saw a positive example of this when the EU decided to extend its clearing obligation to third country entities trading in derivatives. Here, the European Securities and Markets Authority (ESMA) both explained when and why this is necessary and engaged in lengthy and responsive consultations with affected stakeholders.²⁹⁵

While the EU has not yet adopted the Commission's proposal for a financial transaction tax,²⁹⁶ the proposal is also pertinent to this report for a second reason. It illustrates a possible tension between unilateral external differentiation and the enhanced cooperation procedure laid down in the TEU.²⁹⁷ Given the importance of the enhanced cooperation procedure for the InDivEU project as a whole, we will exemplify this tension by reference to the proposal for a financial transaction tax in the section below.

3.2 Unilateral External Differentiation and Enhanced Cooperation

In areas that do not fall within the EU's exclusive competences, it is open to a group of at least nine Member States to pursue enhanced cooperation. This is subject to authorization by the Council and to the conditions laid down in the Treaties.²⁹⁸ A decision authorizing enhanced cooperation shall only be adopted by Council as a last resort when it has been established that the objectives of such cooperation cannot be achieved within a reasonable period of time by the Union as a whole.²⁹⁹ Acts adopted in the framework of the enhanced cooperation procedure are only binding on the participating Member States,³⁰⁰ and shall respect the competences, rights and obligations of non-participating Member States.³⁰¹ Moreover, expenditure resulting from the implementation of enhanced cooperation, other than administrative costs entailed for the EU institutions, shall only be borne by the participating Member States unless the Member States unanimously decide otherwise having consulted the European Parliament.³⁰²

²⁹³ 2013 Proposal, above, n. 286.

²⁹⁴ 2013 Proposal, above, n. 286.

²⁹⁵ ESMA, Final Report Draft Technical Standards under EMIR on contracts with a direct, substantial and foreseeable effect within the Union and non-evasion. Commission Delegated Regulation 285/2014.

²⁹⁶ To keep up to date with developments in this respect, see: European Commission, 'Taxation of the Financial Sector' at: https://ec.europa.eu/taxation_customs/taxation-financial-sector_en.

²⁹⁷ See Article 20 TEU and Articles 326-334 TEU.

²⁹⁸ Ibid.

²⁹⁹ Article 20(2) TEU.

³⁰⁰ Article 20(4) TEU.

³⁰¹ Article 327 TFEU.

³⁰² Article 332 TFEU.

The Council adopted a decision authorizing enhanced cooperation in the area of financial transaction tax in 2013.³⁰³ This authorized eleven Member States (EU-11) to move forward with the adoption of a financial transaction tax. The United Kingdom, being among the non-participating Member States, challenged the legality of the Council's decision in a direct action before the CJEU.³⁰⁴ Alongside arguments relating customary international law limits on the exercise of prescriptive jurisdiction, the United Kingdom raised two points concerning the compatibility of the Decision with EU Treaty provisions on enhanced cooperation. First, the UK argued that due to the inclusion of the counterparty and issuance principles, discussed above, the financial transaction tax would apply to institutions, persons and transactions taking place in the territory of non-participating Member States; and consequently adversely affect the competences and rights of non-participating states in a manner that is contrary to Article 327 TFEU.³⁰⁵ Second, the UK argued that the decision was contrary to Article 332 TFEU because implementation of the tax would entail costs for the non-participating Member States³⁰⁶

The European Court dismissed the action on the basis that neither the counterparty principle nor the issuance principle were 'constituent elements' of the Council decision authorizing enhanced cooperation which the United Kingdom had challenged before the Court.³⁰⁷ Rather the emergence of these effects would be contingent on the adoption by the EU-11 of the Commission's proposal for a financial transaction tax. Although the CJEU did not address the substantive arguments in the case, these arguments raise issues of importance for our discussion of unilateral external differentiation and we will therefore examine them below.

Turning first to the argument that, if adopted, the directive establishing a financial transaction tax would affect the competences, rights or obligations of non-participating Member States: While it is clear that the tax would impose a fiscal burden on financial institutions in non-participating Member States, due to the operation of the counterparty and issuance principles, it is less certain that the directive would affect the competences, rights or obligations of non-participating Member States. After all, the directive establishing a financial transaction tax would neither oblige a non-participating Member State to exercise its fiscal competence by introducing a financial transaction tax, nor would it prevent it from doing so. In formal terms then, the competence of non-participating Member States would be unaffected.

However, if a non-participating Member State were to exercise its fiscal competence to introduce a financial transaction tax, in practice, it is likely that the design of this instrument would be influenced by the EU-11 tax financial transaction tax (if adopted). In particular, the Commission proposal for a financial transaction tax does not provide for double tax relief when the tax is levied on a financial institution in a non-participating Member State. Thus, if a non-participating Member State were to adopt a domestic tax, it would have a strong incentive to include provisions to prevent its financial institutions from incurring double taxation. Given the absence of double tax relief in the Commission's proposal for a financial transaction tax, it would be the non-participating Member State that would suffer a loss of revenue as a result of such provisions. Awareness of this could even influence a non-participating Member State's decision about whether to move forward with adopting a financial transaction tax. All in all, in this example, it is possible to argue that recourse to enhanced cooperation would be liable to affect the competence of a non-participating Member State, if by 'competence' we mean the mode of exercising legal authority rather than its mere existence. This is due to the manner in which the instrument based on enhanced cooperation reaches out beyond the territory of the participating Member States.

³⁰³ 2013 Proposal, above n. 286.

³⁰⁴ Case C-209/13, above n. 287.

³⁰⁵ *Ibid*, paras. 18-19.

³⁰⁶ *Ibid*, para. 22.

³⁰⁷ *Ibid*, paras. 36 & 39.

Moving on to the United Kingdom's second argument which related to the imposition of costs on non-participating Member States, in a manner said to be contrary to Article 332 TFEU: In essence, the argument here was that UK tax authorities could be obliged to collect the tax due by a financial institution established within it, and to transfer the monies to the tax authorities of a participating Member State.³⁰⁸ This would generate additional costs for the tax authorities of a non-participating Member State.³⁰⁹ While this point was conceded by then Commission Vice-President Maroš Šefčovič when giving evidence to the House of Lords European Union Committee, he argued that it was a 'minor consideration' and that this expenditure should be considered as primarily a consequence of the mutual recovery regime rather than the proposal for a financial transaction tax.³¹⁰ This seems unconvincing given that tax authorities would incur additional expenditure due specifically to the adoption of a measure based on enhanced cooperation. It is not far-fetched to view this additional expenditure as 'resulting from implementation of enhanced cooperation' within the meaning of Article 332 TFEU.

While this second argument is more specific to the tax context of the Commission's proposal, it does nonetheless flow from the fact that the proposal gives rise to unilateral external differentiation and imposes tax liability on institutions based in non-participating Member States. It is only due to this that a non-participating Member State could incur an obligation under existing EU legislation to collect the tax due within its territory and to transfer the proceeds to a participating Member State. This second argument also demonstrates the importance of examining the interaction between the extraterritorial effects of measures based on enhanced cooperation and existing arrangement for administrative cooperation between Member States.

3.3 Legal Feasibility: WTO Law

Having examined the jurisdictional constraints that may limit the legal feasibility of unilateral external differentiation, it is necessary to consider whether WTO law imposes legal limits on measures of this kind. The EU and its Member States are Parties to the WTO Agreement which is therefore binding upon them.

Although the 'case law' of the WTO Appellate Body is ambiguous in some important respects, this body has on the whole been willing to accept that it may, in principle, be lawful for Member States to restrict imports due to the manner in which the goods in question have been harvested or produced.³¹¹ This is clear from the famous *Shrimp-Turtle* case. Here, India, Malaysia and Thailand challenged the WTO-compatibility of a U.S. measure that restricted the importation of shrimp which had been harvested in a manner that posed a threat to endangered species of sea turtles. More particularly, the U.S. measure prohibited the importation into the U.S. of shrimp products that had been harvested in a country that did not meet U.S. standards relating to the use of turtle exclusion devices. These devices are designed to prevent turtles being killed as a 'by-catch' of fishing for shrimp. In this example, had the contested measure been adopted by the EU, we would have considered it as giving rise to legal alignment unilateral external differentiation. It is for this reason that the Appellate Body's report in this case is informative in assessing the WTO-compatibility of measures of this kind.

³⁰⁸ House of Lords, European Union Committee, 'Financial Transaction Tax Alive and Deadly' (7th Report of Session 2013-2014), para. 18. Due to the principle of joint and several liability established by the proposal, financial institutions within a non-participating Member State could ultimately also be liable for unpaid taxes due by third country counterparties to a relevant transaction.

³⁰⁹ *Ibid.*, para. 37.

³¹⁰ *Ibid.*

³¹¹ In relation to the Technical Barriers to Trade Agreement see Gracia Marin-Duran, 'Non-Tariff Barriers the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures After US-Tuna II and EC-Seal Products' (2015) *European Yearbook of International Law* 87.

In the *Shrimp-Turtle* case, the Appellate Body adopted a tolerant stance, accepting that the contested measure was capable in principle of falling within the general exception laid down in GATT, Article XX. It is unfortunate that the clarity of the Appellate Body's report in *Shrimp-Turtle* is somewhat undermined by its refusal to rule on the issue of whether it is lawful for a WTO Member to enact and apply measures of this kind where they are intended to protect the environment or natural resources outside of the territory of the regulating state. The Appellate Body dodged this question by stating that in the circumstances prevailing in relation to the *Shrimp-Turtle* case, there was a 'sufficient nexus' between the U.S. and the endangered species of sea turtles; because these species were known to occur in waters over which the U.S. exercises (territorial) jurisdiction.³¹² It went on to add that 'it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction'.³¹³

In the specific circumstances of this case, however, the U.S. measure was found to give rise to unjustifiable and arbitrary discrimination and hence to breach the 'chapeau' of the 'limited and conditional exception' included in GATT, Article XX.³¹⁴ For one, the U.S. had failed to enter into serious, across-the-board negotiations with Members exporting shrimp to the United States with a view to entering into a bilateral or multilateral agreement for the protection of sea turtles, prior to imposing a unilateral import ban.³¹⁵ In addition, the certification process followed by the U.S. for recognizing that a third country did in fact meet U.S. standards for the protection of sea turtles was described by the Appellate Body as 'singularly informal and casual' and was 'conducted in a manner such that these processes could result in the negation of rights of Members'.³¹⁶

Further, in its mode of application, the U.S. measure was not imbued with sufficient flexibility to permit the conditions prevailing in exporting countries to be taken into account, including the adoption by those countries of comparable or equivalent policies or measures for the protection of sea turtles.³¹⁷ This suggests that measures giving rise to what we have called *legal alignment* unilateral external differentiation must be sufficiently flexible to allow for equivalent third country measures to be taken into account, with equivalence being assessed by reference to the effectiveness of the measures in achieving its stated objective.³¹⁸ The emphasis the EU places on the concept of equivalence in designing and applying regulatory measures of this kind is therefore not misplaced.

Two more recent reports issued by the Appellate Body lend weight to the contention that it may, in principle, be lawful for WTO Members to enact trade-related measures that make importation conditional on third country conduct. First, in the *Tuna-Dolphin* labelling case, the Appellate Body examined the lawfulness of a U.S. measure laying conditions for using the 'dolphin-safe' label.³¹⁹ One objective of this measure was to contribute to the protection of dolphins, 'by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'.³²⁰ While the Appellate Body carefully scrutinized the arguments put forward by Mexico claiming that the

³¹² Report of the WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 133.

³¹³ Ibid.

³¹⁴ Ibid, para. 186.

³¹⁵ Ibid, paras. 166-172 (unjustifiable discrimination) and para. 177 (arbitrary discrimination).

³¹⁶ Ibid, paras. 181-184. The Appellate Body also found that different phase-in periods for different countries and differential efforts in providing technology transfer gave rise to unjustifiable discrimination between countries, contrary to the Article XX chapeau (see *ibid*, paras. 174-175).

³¹⁷ Ibid, paras.161-165

³¹⁸ Ibid, para. 165.

³¹⁹ Report of the WTO Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012.

³²⁰ Ibid, para. 337.

measure was discriminatory and more trade restrictive than necessary to achieve its objectives,³²¹ at no point did it suggest that it was not open to the U.S. to make market access conditional on whether fishing practices in third countries were sufficiently protective of dolphins swimming in waters outside U.S. control. Indeed, the Appellate Body implicitly rejected Mexico's argument that the measure should be condemned on the basis that it pursued a 'coercive objective' because it sought to 'coerce' Mexico 'to change its practices to comply with the unilateral policy of the United States'.³²²

Second, in *EC-Seals*, the Appellate Body evaluated the compatibility of the EU's seals regulation with the GATT.³²³ Subject to a number of exceptions, the contested EU measures prohibited the placing of seal products on the EU market. As in the *Shrimp-Turtle* case, the AB decided to avoid addressing the question of whether there is an implied jurisdictional (territorial) limitation in the GATT's general exception, and whether it may ever be lawful for a Member to take steps in order to protect the environmental resources of other countries. In *EC-Seals*, the AB was able to avoid addressing this issue 'of systemic importance' by concluding that '[t]he principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC [indigenous communities] and other interests so as to mitigate the impact of the measure on those interests'.³²⁴

The Appellate Body therefore 'territorialized' the EU's objective by focusing on the moral objections of EU citizens and consumers regarding the consumption of seal products rather than on the welfare of the seals themselves. Moreover, the AB adopted a generous reading of the public morals exception included in the GATT's general exception in Article XX(a). For example, it not only recognized that Members 'should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values',³²⁵ but also that there is no obligation for Members to treat similar moral concerns in a similar way.³²⁶

In concluding this discussion about WTO law, it appears that WTO law is capable of accommodating measures giving rise to unilateral external differentiation.³²⁷ However, such measures must be designed and applied with great care to ensure that they do not discriminate between countries, are not more trade restrictive than is necessary to achieve their objective(s), and that relevant due process conditions have been met.

3.4 Legal Feasibility: Enforcing Unilateral External Differentiation

The legal feasibility of unilateral external differentiation depends upon it being possible to enforce EU legislation which makes compliance conditional on third country conduct or the content of third country law. This is at least the case if legal feasibility is understood to imply the enactment of legislation with 'bite' as well as 'bark'.³²⁸ For the purpose of this discussion, the concept of enforcement will be taken to include the authorization of activities taking place within the EU, the monitoring of compliance with EU law, the investigation of possible violations, and where necessary the imposition of penalties to sanction a breach of EU law.

³²¹ Ibid, paras. 200-299 and paras. 324-342.

³²² Ibid, paras. 335-338.

³²³ Report of the WTO Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R, 22 May 2014.

³²⁴ Ibid, fn. 1191.

³²⁵ Ibid, para. 5.119

³²⁶ Ibid, paras. 5.200-5.201

³²⁷ Of course, this is only the case where the EU measure pursues one of the objectives recognised by WTO law, such as those recognized by GATT, Article XX.

³²⁸ Dan Jerker B. Svantesson, *Solving the Internet Puzzle* (OUP, 2017), Chapter 6.4.

A wide range of different actors, operating at different levels of governance, including also private actors, are involved in these different dimensions of enforcing EU law. The identity, role and configuration of these actors in relation to one another varies enormously across different policy domains. Traditionally, at least outside of the area of competition law, responsibility for enforcing EU law has rested principally with the EU Member States, albeit that they have always been subject to oversight by EU authorities including prominently the European Commission. However, today ‘European enforcement authorities’ play an increasingly important role.³²⁹ This is the case in a number of policy domains in which prominent examples of unilateral external differentiation are found. This includes, for example, banking and financial services regulation,³³⁰ food safety,³³¹ aviation³³² and maritime safety,³³³ pharmaceuticals,³³⁴ and fisheries.³³⁵

Given the highly complex and variegated enforcement landscape in EU law, it is impossible to offer anything approaching a comprehensive overview here. Rather, this section presents four key observations that should be borne in mind when assessing the legal feasibility of enforcing EU measures giving rise to unilateral external differentiation.

First, customary international law prohibits states from taking steps to enforce their laws in the territory of a third country, unless the third country in question has given its consent, whether on an *ad hoc* basis or as a result of the terms of a treaty. In the absence of consent, enforcement jurisdiction is strictly territorial although ‘[t]he principle of territoriality is not infringed just because a state takes action within its own borders with respect to acts carried out in another state’.³³⁶

Second, in keeping with this, it is significant that many of the tasks associated with enforcing EU measures giving rise to unilateral external differentiation can be undertaken domestically within the territory of EU Member States. For example, the EU often makes access to its market conditional upon a third country entity being authorized by a Member State or the EU.³³⁷ An entity seeking authorisation may be required to submit information and documentation that can be evaluated ‘at home’ by regulatory authorities within the EU. Where deficiencies are uncovered, an authorization may be refused, suspended or revoked. Moreover, an entity engaging in commercial activities within the EU will

³²⁹ Miroslava Scholten & Michiel Luchtman (eds.), *Law Enforcement by EU Authorities* (Edward Elgar, 2017).

³³⁰ The European Securities and Markets Authority (ESMA) at: <https://www.esma.europa.eu>.

³³¹ The Food and Veterinary Office (FVO) at: http://ec.europa.eu/food/fvo/index_en.print.htm.

³³² European Aviation Safety Authority (EASA) at: <https://www.easa.europa.eu>.

³³³ European Maritime Safety Agency (EMSA) at: <http://www.emsa.europa.eu>.

³³⁴ European Medicines Agency at: <https://www.ema.europa.eu/en/partners-networks/pharmaceutical-industry>. For an example of conduct-related unilateral external differentiation the area of pharmaceuticals, see Article 12(2) & 43(2), Regulation 726/2004 laying down Union procedures for the authorisation and supervision of medicinal products for human and veterinary use, <http://data.europa.eu/eli/reg/2004/726/2019-03-30>. For ethical requirements relating to third country clinical trials see recital 6, Directive 2001/20 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, <http://data.europa.eu/eli/dir/2001/20/2009-08-07>. See also European Medicines Agency, ‘Reflection paper on ethical and GCP aspects of clinical trials of medicinal products for human use conducted outside of the EU/EEA and submitted in marketing authorization applications to EU regulatory authorities (16 April, 2012) at: https://www.ema.europa.eu/en/documents/regulatory-procedural-guideline/reflection-paper-ethical-good-clinical-practice-aspects-clinical-trials-medicinal-products-human-use/european-economic-area-submitted-marketing-autho_en.pdf.

³³⁵ European Fisheries Control Agency (EFCA) at: <https://www.efca.europa.eu>.

³³⁶ Crawford, above n. 259, p. 462.

³³⁷ For example, classification societies which want to provide statutory services to a EU Member State, certifying a ship’s compliance with international conventions, must be recognised by the EU (recognised organisations or ROs). See Article 3, Regulation 391/200 on common rules and standards for ship inspection and survey organisations, <http://data.europa.eu/eli/reg/2009/391/oj>. See also Article 8(1) which lays down information requirements to facilitate Commission assessment of Ros on an ongoing basis.

normally have a commercial presence or assets within the EU, thereby facilitating the imposition of penalties for non-compliance. Such penalties may include the imposition of fines, administrative penalties, the seizure or confiscation of assets or other ‘market-destroying measures’ of various kinds.³³⁸

Third, even ‘at home’ enforcement will often necessitate cooperation with third countries. To take an obvious example: While EU legislation sometimes requires or permits Member States to establish criminal jurisdiction over offenses that are committed in a third country,³³⁹ it is not open to them to pursue or arrest the accused in a third country in the absence of that country’s consent. Where a third country does not agree to extradite (or expel or deport) an alleged offender to the relevant EU Member State,³⁴⁰ the Member State’s only option is to engage in the ‘unsatisfactory procedure’ of trial *in absentia*.³⁴¹

It would likewise be impossible for the EU to evaluate whether the law of a third country’s regulatory, supervisory and enforcement regime is equivalent to the corresponding EU framework without intensive and time-consuming cooperation with the third country in question.³⁴² This is true both for the adoption of an initial equivalence decision by the European Commission and in relation to the process of monitoring regulatory and supervisory developments in third countries. Cooperation is based on administrative arrangements that allow the EU authorities to obtain relevant information for the purpose of evaluating and monitoring equivalence.

Fourth, there are, however, clear limits to what ‘in territory’ enforcement can achieve in relation to unilateral external differentiation. On-site visits in third countries will sometimes be necessary to monitor compliance with EU law and to investigate possible violations.

Such visits may be carried out by Member State or EU regulatory authorities. For example, the European Aviation Safety Agency may decide to conduct a safety audit at a third country operator’s facilities where the operator is subject to an operating ban.³⁴³ This is subject to the consent of the operator and the audit may also include an assessment of the oversight of the third country where there is evidence of major deficiencies in the oversight of the applicant.³⁴⁴ Similarly, National Data Protection Authorities are reported to have conducted on-site audits of data processing facilities in third countries in order to verify compliance with EU data protection law.³⁴⁵ This includes, for example, a visit by the Italian Data Protection Authority to Google’s premises in California. On the other hand, such visits may be carried out by the regulatory authorities of a third country or by private bodies, subject to oversight by Member State or EU regulatory authorities. In this case, the EU performs a meta-regulatory function, laying down standards with which third country authorities or private bodies must conform.³⁴⁶

³³⁸ Svantesson, above n. 328, p. 144.

³³⁹ See examples at above n. 252,

³⁴⁰ Torsten Stein, ‘Extradition’ in *Oxford Public International Law* at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e797>.

³⁴¹ Crawford, above n. 259, p. 465

³⁴² For a discussion in relation to equivalence decisions in relation to EU financial markets see Eddy Wymeers, ‘Third Country Equivalence and Access to the EU Financial Markets Including the Case of Brexit’ (2018) 4 *Journal of Financial Regulation* 209.

³⁴³ Article 205, Commission Regulation 452/2014 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, <http://data.europa.eu/eli/reg/2014/452/oj>. See also details of EMSA inspections of ROs under Regulation 391/2009, n. 337 above, at: <http://emsa.europa.eu/visits-a-inspections/assessment-of-classification-societies.html>.

³⁴⁴ *Ibid.*

³⁴⁵ Christopher Kuner, ‘The Internet and the Global Reach of EU Law’ in Cremona & Scott, n. 251, above, p. 126.

³⁴⁶ Jolene Lin, ‘Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuel Certification Regime and the Clean Development Mechanism’ (2012) 24 *JEL* 43. See more generally Yoshiko Naiki, ‘Meta-Regulation of Private

In her PhD thesis, Jaruprapa Rakpong provides a compelling illustration of the role played by national authorities, serving as EU competent authorities, in ensuring respect for food safety standards in Thailand.³⁴⁷ These national authorities operated under the close supervision of the EU Food and Veterinary Office (FVO) which carries out inspections in third countries. Rakpong shows how the recommendations put forward by the FVO led to substantial alterations in the institutional infrastructure for food safety in Thailand.

Private actors also play an important role in verifying respect for EU standards in third countries. For example, the role of private certification bodies in ensuring respect for EU sustainability standards in the production of biofuels in third countries is well known.³⁴⁸ Here, the EU has laid down conditions that ‘voluntary schemes’ must meet in order to obtain EU approval.³⁴⁹

A less well known example relates to air carriers flying cargo or mail from a third country into the EU which are required to comply with the ‘EU ACC3’ programme.³⁵⁰ These air carriers must ensure that all cargo or mail is physically screened according to EU standards or comes from an EU aviation security validated secure supply chain. EU aviation security validation is carried out by an individual who has received approval from the EU as an EU aviation security validator by the competent authority of the relevant Member State. The EU has laid down conditions that individuals seeking such approval must meet.³⁵¹

As these and other examples make clear, that the challenge of enforcing EU law in third countries has spawned a multitude of different institutions and mechanisms. These rely heavily on achieving effective cooperation between EU and third country entities and regulatory authorities. There is a strong incentive within third countries to cooperate where access to the EU market is rendered conditional on demonstrating that third country conduct or third country law meets the standards laid down in EU law.

4. Constitutional Acceptability

We will turn finally to the question of the constitutional acceptability of unilateral external differentiation, having specific regard to the constitutionalisation of EU external relations under the TEU.

The constitutional framework for EU external relations is constituted in significant part by Articles 3(5) and 21 TEU.³⁵² In evaluating the constitutional acceptability of unilateral external differentiation, it is important to be aware that this framework is both complex and vague. In light of this, it will be argued that this framework should be viewed first and foremost as providing a set of normative benchmarks to guide the legislature in enacting and justifying measures of this kind. However, there are certain norms included in this framework that may be considered to be sufficiently concrete to serve as benchmarks for substantive judicial review (as opposed to reason giving judicial review).

Standards: The Role of Regional and International Organizations in Comparison with the WTO’ (2020) *World Trade Review* [cite to be completed].

³⁴⁷ Jaruprapa Rakpong, ‘Regulatory Aspects of EU-Thai Trade Relations in the Area of Food Safety’ (UCL Discovery, 2011) at: <https://discovery.ucl.ac.uk/id/eprint/1348547/1/1348547.pdf>.

³⁴⁸ Jolene Lin, above n. 346 and Yoshiko Naiki, Trade and Bioenergy: Explaining and Assessing the Regime Complex for Sustainable Bioenergy’ (2016) 27 EJIL 129.

³⁴⁹ For details and a list of approved voluntary schemes see: https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes_en?redir=1.

³⁵⁰ For a general overview see: https://ec.europa.eu/transport/modes/air/security/cargo-mail/entities_en. Also Section 6.8 Annex to Commission Implementing Regulation 2015/1998, above n. 231.

³⁵¹ The European Commission hosts a website that provides information for those interested in becoming an EU aviation security validator: https://ec.europa.eu/transport/modes/air/security/cargo-mail/validators_en.

³⁵² See also the provisions having general application in Articles 7-17 TFEU.

The constitutional framework constituted by Articles 3(5) and 21 TEU is complex. This is true, in the first instance, in relation to its scope of application. Article 3(5) applies to the EU ‘in its relations with the wider world’. While it is not self-evident that this would extend to the adoption of measures giving rise to unilateral external differentiation, the CJEU had no difficulty in invoking this article when reviewing the validity of the EU’s directive including extraterritorial GHG emissions within the scope of the emissions trading scheme.³⁵³ Article 21, by contrast, applies to EU external action, such as Common Commercial Policy and Common Foreign and Security Policy,³⁵⁴ as well as to ‘the external aspects of [the EU’s] other policies’. Due to this latter phrase, it is clear that it is relevant in assessing the constitutional acceptability of unilateral external differentiation.

This constitutional framework is rendered more complex due to the variety of sources and standards of normativity that are enunciated within these articles. In terms of sources, it includes values, interests, principles and objectives. In terms of standards, the EU’s obligations in relation to these different sources varies considerably. The different standards of normativity are summarized in the table below. While recourse to the term ‘shall’ implies a legal obligation, the nature of the obligation is highly variable. Some obligations clearly take the form of obligations of conduct,³⁵⁵ particularly the obligation for the EU to promote its values and interests in Article 3(5) and to pursue the objectives in Article 21(5). Other obligations may be considered to be obligations of result, particularly the obligation to uphold its values and interests and to respect the principles in Article 21(1). The EU’s obligation to contribute to the protection of its citizens, while an obligation of result, is extremely vague as there is no specification as to the degree of contribution that the EU must achieve.

³⁵³ ATAA, above n. 250, para. 101.

³⁵⁴ Article 21(3) TEU defines the scope of the EU’s external action as including Common Foreign and Security Policy and the areas covered by Part Five of the TFEU (namely, common commercial policy, cooperation with third countries and humanitarian aid, restrictive measures, international agreements, the EU’s relations with international organisations, third countries and Union delegations).

³⁵⁵ On the well-known distinction between obligations of conduct and obligations of result, see: James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), pp 21-23.

Standards of normativity in EU external relations

Source of normativity	Standard of normativity
Values	The EU <i>shall uphold and promote</i> its values in its relations with the wider world (Article 3(5))
Interests	The EU shall <i>uphold and promote</i> its interests and <i>contribute to</i> the protection of its citizens in its relations with the wider world (Article 3(5))
Principles	The EU <i>shall respect</i> the principles in Article 21(1)
Objectives	The EU <i>shall contribute</i> to the objectives laid down in Article 3(5) The EU <i>shall pursue</i> the objectives in Article 21(2)

As this discussion already suggests, the constitutional framework governing EU external relations is not only complex but also vague. This is true in relation to the substantive content of the EU's values set out in Article 2, and also in relation to both the principles in Article 21(1) and the objectives set out in Article 3(5) and 21(2). There is no guidance about how the EU should prioritize between the different values that it is required to uphold, or the different principles that it is required to respect; or how trade-offs between values and/or principles, and between the multitude of different objectives, are to be achieved. As Cremona has pointed out in relation to the EU's external policy objectives, these are 'non-teleological, non-prioritised, open-ended and concerned more with policy orientation than goal setting'.³⁵⁶

In view of the complexity and vagueness of this constitutional framework, how then should the question of constitutional acceptability be approached in relation to unilateral external differentiation? We suggest that first and foremost this constitutional framework should be regarded as providing reference points according to which EU reason giving, or justification, of unilateral external differentiation should proceed. There are many elements of this constitutional framework that can be used to support or arguably even require interventions of this kind.

³⁵⁶ Marise Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in Marise Cremona & Anne Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Hart Publishing).

As many of the examples above make clear, such measures may promote EU values and interests and contribute to protecting EU citizens as required by Article 3(5).³⁵⁷ They may improve the quality of the environment or consolidate and support the protection of human rights.³⁵⁸ However, it will almost invariably be the case that in adopting such measures, the EU will have to identify priorities and endorse trade-offs between the many different sources of normativity that have been identified. There is some evidence to suggest that the EU is not always sufficiently attentive to the negative consequences of unilateral external differentiation in third countries;³⁵⁹ for example as regards the impact of such measures on the eradication of poverty in third countries.³⁶⁰

Of particular importance in relation to unilateral external differentiation, is the compatibility of unilateral external differentiation with the EU's clearly spelt out obligation to promote an international system based on stronger multilateral cooperation.³⁶¹ Here, in terms of reason giving, the EU should be required to demonstrate that it is acting as a 'contingent' unilateralist.³⁶² As such, the EU should provide evidence that it has pursued good faith efforts at multilateral cooperation prior to the adoption of a unilateral measure; and that the EU's unilateral intervention is provisional pending the emergence of a satisfactory multilateral solution to the problem at hand. Acting as a contingent unilateralist, the EU can quite reasonably claim that there are circumstances in which unilateral action can contribute to the development of international law and can promote an international system based on stronger multilateral cooperation.³⁶³

We see clear examples of contingent unilateralism of this kind in relation to the reduction of GHG emissions from both international aviation and shipping.³⁶⁴ This does not negate the fact that the EU sometimes faces difficult questions about when the results of multilateral cooperation should be considered sufficiently ambitious to permit the EU to step back from its unilateral intervention. In relation to climate change and international aviation and shipping, the steps taken by the relevant international organization fall well short in terms of their level of ambition by comparison with the

³⁵⁷ For example, the effects doctrine permits the adoption of measures which regulate extraterritorial conduct that has negative effects on the EU's interests and/or protect EU citizens. Examples of unilateral external differentiation which promote protection of human rights in third countries offer examples of measures that promote EU values. See e.g. Regulation 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, <http://data.europa.eu/eli/reg/2019/125/oj> (torture equipment regulation).

³⁵⁸ E.g. *ibid* torture equipment regulation in relation to human rights and the EU's directive including international aviation in the ETS (above n. 232) in relation to climate change/sustainable development.

³⁵⁹ For a discussion in relation to environmental measures see Ioanna Hadjiyianni, *The EU as a Global Regulator for Environmental Protection* (Hart Publishing, 2019).

³⁶⁰ See e.g. legislative history in relation to adoption of Regulation 1257/2013 on ship recycling, <http://data.europa.eu/eli/reg/2013/1257/oj>. To the extent that the impact assessments and explanatory memorandum focused on possible negative consequences associated with the adoption of the measure, these were consequences that would be manifested within the EU. In relation to third country consequences, the EU accentuated the positive. It is, however, clear, that regulatory interventions in this area imply trade-offs between different groups in third countries, including vulnerable groups. For a discussion see Federico Demaria, 'Ship-Recycling at Alang-Sosiya: An Ecological Distribution Conflict' (2010) 70 *Ecological Economics* 250.

³⁶¹ Pursue the objective of help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development

³⁶² For a discussion of this concept see Scott & Rajamani, above n. 248.

³⁶³ As required under Article 3(5) TEU and Article 21(2)(g).

³⁶⁴ There can be little doubt that unilateral initiatives by the EU contributed to the emergence of multilaterally agreed solutions in the International Civil Aviation Organization and the International Maritime Organization. For aviation, see ICAO Assembly Resolution A39-3 'Consolidated statement of continuing ICAO policies and practices related to environmental protection – Global Market-based Measure (MBM) scheme' and follow-up documents at: <https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx>. For shipping, see IMO, Resolution, MEPC/278(70), Amendment to MARPOL Annex VI (Data collection system for fuel oil consumption by ships) at: <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Documents/278%2070%29.pdf>.

measures adopted by the EU.³⁶⁵ While the EU continues to apply its Monitoring, Reporting and Verification (MRV) Regulation in relation to shipping, international flights starting or ending their journey outside of the EEA are still not included in the EU-ETS pending a further review of international developments in this area.³⁶⁶

Although we consider that the constitutional framework established by Articles 3(5) and 21 TEU should be viewed primarily as providing reference points for the EU legislature to justify the adoption of legislation giving rise to unilateral external differentiation, we are also clear that there are circumstances in which it may be possible to point to a substantive breach of this constitutional framework. Such a breach could, in principle, form the basis for judicial review before the CJEU. In view of the complexity and vagueness of the different sources of normativity identified above, this is most likely to be the case when it can be demonstrated that there is an incompatibility between EU law and public international law. This is because the EU is required to contribute to the strict observance of international law,³⁶⁷ and to respect the principles of public international law.³⁶⁸ This includes international human rights norms in both customary international law and treaties that are binding on the EU.³⁶⁹

Consistent with this, as was already seen above in relation to the exercise of prescriptive jurisdiction, the CJEU has been willing to scrutinize the compatibility of measures giving rise to unilateral external differentiation with customary international law. '[T]he European Union is to contribute to the strict observance and development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union'.³⁷⁰ Moreover, the priority of international agreements over EU secondary law has been recognized both by the TFEU,³⁷¹ and by the European Court.³⁷²

However, other than in relation to bilateral trade and Association Agreements, the CJEU has adopted an extremely restrictive attitude to the invocability of multilateral agreements that are binding on the EU as a basis to challenge the validity of an EU act.³⁷³ It has denied this on multiple occasions, either on the basis that the agreement in question is not unconditional or sufficiently clear and precise; or on the basis that the invocability of an agreement is precluded due to its 'nature and broad logic'.³⁷⁴ In assessing the latter, the CJEU considers whether an agreement establishes 'rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'.³⁷⁵ In applying these conditions, the CJEU has denied direct effect to many

³⁶⁵ The environmental NGO, Transport & Environment has produced comparisons of the EU measures and the ICAO/IMO schemes. See, in relation to ICAO, 'A Comparison Between ICAO's CO₂ Offsetting Scheme and the EU ETS for Aviation' at: <https://www.transportenvironment.org/publications/comparison-between-icaos-co2-offsetting-scheme-and-eu-ets-aviation>. See, in relation to IMO, [forthcoming JEL article].

³⁶⁶ For updates concerning this review see: https://ec.europa.eu/clima/policies/transport/aviation_en.

³⁶⁷ Article 3(5) TEU.

³⁶⁸ Article 3(5) and 21(1) TEU.

³⁶⁹ For a good discussion in relation to the human rights theme, see Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 *EJIL* 1071.

³⁷⁰ ATAA, above n. 250, para. 101

³⁷¹ Article 216(2) TFEU.

³⁷² See e.g. Opinion 1/15, *EU-Canada PNR Agreement*, para. 67, ECLI:EU:C:2017:592.

³⁷³ Bruno De Witte, 'Accession to International Instruments as an EU Legality Constraint' in Claire Kilpatrick & Joanne Scott, *Contemporary Challenges to EU Legality* (forthcoming OUP, 2021).

³⁷⁴ See *ibid* for many examples. ATAA, above n. 250, para. 77, for an example of the former. Case C-308/06, *Intertanko* paras 64 for an example of the latter, ECLI:EU:C:2008:312 for an example of the latter.

³⁷⁵ E.g. *ibid*, ECLI:EU:C:2008:312.

important agreements, among them the WTO Agreement,³⁷⁶ the UN Convention on the Protection of Persons with Disabilities,³⁷⁷ the Kyoto Protocol³⁷⁸ and the United Nations Convention on the Law of the Sea.³⁷⁹

The CJEU's restrictive attitude to the direct effect of international agreements has important implications in assessing the constitutional acceptability of measures giving rise to unilateral external differentiation. This is because in the absence of direct effect such agreements cannot be invoked before the CJEU as a basis for challenging the validity or legality of an EU act giving rise to unilateral external differentiation. We find evidence of this in both the *Air Transportation of America* case in relation to the Kyoto Protocol and in *Intertanko* in relation to the UN Convention on the Law of the Sea. In view of the Court's restrictive attitude, it is clear that measures giving rise to unilateral external differentiation can remain valid law even in circumstances in which there may be a strong argument to suggest that they are incompatible with an international agreement that is binding on the EU.

The unwillingness of the CJEU to treat most international agreements as directly effective has been matched over recent years by a similar reticence on the part of the EU legislature.³⁸⁰ It is increasingly common for international agreements entered into by the EU to expressly exclude their invocability before courts. All in all, these developments do call into question the constitutional acceptability of unilateral external differentiation because it is excessively difficult to enforce international agreements in the EU legal order, thereby making it impossible to ensure that such measures contribute to the strict observance of international law.

The CJEU's approach to the direct effect of international agreements forms part of a broader story about the role of the CJEU as a 'reticent' or 'non-interventionist' court when it comes constraining the policy choices of the EU's political institutions in external relations.³⁸¹ More particularly, as Cremona has pointed out, '[t]he Court has not sought to establish priorities among the external objectives expressed in the Treaties....neither has it looked for opportunities to establish fundamental principles to guide external action...[and the Court] places emphasis on the need to preserve room for the exercise of political discretion' on the part of the EU legislature and those negotiating agreements on behalf of the EU.³⁸²

To conclude this discussion: It is our view that the constitutional acceptability of unilateral external differentiation depends in significant part on the adequacy of the reasons put forward by the EU legislature to justify the adoption of measures of this kind. These reasons should be framed according to the different sources of normativity included in the EU's constitutional framework for the conduct of its external relations broadly defined. These sources of normativity are varied and vague and the relationship between the different elements is not clearly defined. The EU legislature is therefore required to play an important role in elaborating and applying this framework. The choices that it makes in doing so should be clearly explained and justified. The adequacy of the reasons given by the EU political institutions should be assessed by the CJEU having regard to the values, principles and objectives laid down in Articles 3(5) and 21 TEU.

³⁷⁶ Case C-149/96, *Portugal v. Council*, ECLI:EU:C:1999:574. This is subject to an exception where WTO norms have been expressly incorporated into EU law.

³⁷⁷ For an example of the latter, see Case C-363/12, *Z v. A Government Department and the Board of Management of a Community School*, ECLI:EU:C:2014:159 in relation to the UN Convention on the Protection of Persons with Disabilities.

³⁷⁸ *ATAA*, above n. 250, para. 77.

³⁷⁹ *Intertanko*, above n. 374, para. 64.

³⁸⁰ De Witte, above n. 373, Section 4, citing multiple examples including FTAs with Korea, Singapore, Colombia and Peru, the EPA with the CARIFORUM states and CETA. Also, the Association Agreement with Ukraine.

³⁸¹ Cremona, above n. 356.

³⁸² Cremona, above n. 356.

We would also argue that the constitutional acceptability of unilateral external differentiation would be greatly enhanced if the CJEU were to adopt a less restrictive stance to reviewing the compatibility of EU measures with international agreements. In view of the Court's current stance, there can be little confidence that such measures always contribute to the strict observance of international law. It is unfortunate to conclude in light of this that it is the case law of the CJEU concerning the direct effect of international agreements that poses a fundamental challenge to the constitutional acceptability of unilateral external differentiation.

Part IV: Overall conclusion

Taking our lead from the InDivEU project document, we have adopted an understanding of external differentiation as a legal phenomenon in the sense that it is embedded in the text of EU law. External differentiation arises on the one hand when an international agreement entered into by the EU requires one or more third countries to adopt EU law or to achieve a specified degree of alignment between third country and EU law. It also arises when a unilateral EU act makes the granting of an advantage conditional on legal alignment and/or on ‘foreign conduct’ complying with EU law. It is a legal phenomenon in the sense that it arises when EU law is written in such a way that it expressly reaches out to include foreign conduct within its scope or to shape the content of third country law. It is because of this that when external differentiation occurs, we consider that EU law may be viewed as applicable in some form within a third country.

Although we have treated external differentiation as a legal phenomenon and evaluated its legal feasibility and constitutional acceptability in light of this, we do not mean to suggest that legal instruments giving rise to external differentiation do not depend on non-legal sources of EU influence or power. For example, when third countries decide to enter into an international agreement with the EU which requires them to align their domestic law with that of the EU, they may be motivated by a whole range of different types of considerations. For example, Lavenex and Schimmelfennig have distinguished between institutionalist, power-based and domestic structure-based explanations of what they term external governance.³⁸³ Gilardi, by contrast, has distinguished between different drivers of norm diffusion: coercion, competition, learning, and emulation.³⁸⁴ While our study of external differentiation as a legal phenomenon recognizes the existence of a legally distinctive form of external governance which we call external differentiation, it does not seek to address or answer the question of why third countries decide to align their domestic law with EU law, or why actors within third countries are willing to tailor their conduct to ensure compliance with EU law. The question of ‘why’ external differentiation occurs will be addressed in WP6 (‘DI beyond the Member States: External and Regional Differentiation’) which forms part of the broader InDivEU project.

Our concept of external differentiation as a legal phenomenon overlaps with closely related concepts which have been developed in academic literature in law and political science. This includes external governance,³⁸⁵ extended experimentalist governance³⁸⁶ the Brussels Effect³⁸⁷ and Market Power Europe.³⁸⁸ It should not, however, be regarded as coterminous with any of these other concepts. At the risk of repetition, this is because of the emphasis we place on the existence of a legal obligation which is embedded in EU law requiring legal or behavioural change within a third country to ensure conformity with EU law.

Many of our examples of external differentiation can also readily be viewed as examples of the related concepts identified above. However, these other concepts are more broadly drawn than our concept of external differentiation, in that they include instances of third country alignment with EU law which arise even in circumstances when this alignment is not legally required by EU law. For example, the *de facto* Brussels Effect arises when third country corporations decide to *over-comply* with

³⁸³ Sandra Lavenex & Frank Schimmelfennig, ‘EU Rules Beyond EU Borders: Theorising External Governance in EU Politics’ (2009) 6 *Journal of European Public Policy* 791.

³⁸⁴ Fabrizio Gilardi, ‘Transnational Norm Diffusion: Norms, Ideas and Policies’ in Walter Carlsnaes, Thomas Risse & Beth Simmons (eds), *Handbook of International Relations* (Sage Publications, 2012), p. 453.

³⁸⁵ Lavenex & Schimmelfennig, above n. 383.

³⁸⁶ Jonathan Zeitlin (ed.), *Extending Experimentalist Governance: The European Union and Transnational Regulation* (OUP, 2015).

³⁸⁷ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, 2020).

³⁸⁸ Chad Damro, ‘Market Power Europe’ (2012) 19 *Journal of European Public Policy* 682.

EU law, aiming to achieve conformity with its standards even in circumstances when compliance is not required by EU law.³⁸⁹ Similarly, extended experimentalist governance may be deemed to arise even when the EU acts as a ‘a de facto [as opposed to *de jure*] global standard setter, peer reviewer, and capacity builder operating along experimentalist lines’.³⁹⁰ While some examples of extended experimentalist governance are undeniably built on measures that give rise to external differentiation,³⁹¹ this is not invariably the case. For instance, although the EU’s REACH Regulation concerning chemicals has ‘migrated’ outside of the EU, and has been viewed as an example of extended experimentalist governance, this measure does not require alignment between EU and third country law as a condition of market access, or explicitly regulate the process of manufacturing chemicals in third countries.³⁹² Consequently, on our terms, REACH does not give rise to external DI.

There is, however, a very close relationship between our understanding of external differentiation and the concepts of extraterritoriality and territorial extension in EU law.³⁹³ This is because these latter phenomena are also legal in nature and depend for their existence on the content of EU law. More specifically, they arise when EU legislation requires third country law or ‘foreign conduct’ to be in accordance with EU law. However, the conception of unilateral external differentiation relied on in this report is broader than the concepts of extraterritoriality and territorial extension taken together. This is because these later concepts only include unilateral EU acts (unilateral external DI) and therefore do not include external DI that is achieved through international agreements.

We took our lead in defining external differentiation as a legal phenomenon from the ‘Concept and Methodology’ section in the InDivEU project document.³⁹⁴ As noted in the introduction, this considers external differentiation to arise ‘when EU rules are legally valid in at least one non-member country for some time’.³⁹⁵ Due to this emphasis on the concept of the legal validity of EU rules in third countries, we decided to centre our study on circumstances in which EU law explicitly requires legal or behavioural change within a third country as a condition for achieving compliance with EU law. There is, moreover, a sensible fit between this understanding of external differentiation as a legal phenomenon and the research question that we were asked to address; namely, does external differentiation generate concerns relating to legal feasibility or constitutional acceptability? This is because distinct issues of this kind arise when the phenomenon of external differentiation is somehow enshrined in the very fabric of EU law.

In defining the scope of our study, we were however cognizant of the fact that a different understanding of external differentiation is laid down in WP6 which is concerned with external and regional differentiation.³⁹⁶ As previously noted, external differentiation is defined here as involving the participation of non-EU Member States in EU policies, institutions and programmes. This broader definition was one factor leading us to include ‘cooperation’ and ‘participation’ within the scope of our

³⁸⁹ Similarly, external governance includes three different modes of external governance, namely hierarchy, network and market. While there is overlap between both the hierarchy and market modes and our notion of external differentiation, external governance also includes examples that do not involve binding obligations in EU law, requiring legal alignment between third country and EU law and or EU law-compliant foreign conduct.

³⁹⁰ Zeitlin, ‘Conclusions: Empirical Findings and Experimentalist Pathways’, above n. 386, p. 326.

³⁹¹ This would include prominently food safety, data protection and financial regulation. See Maria Weimer & Ellen Vos, ‘The role of the EU in transnational regulation of food safety’, Abraham Newman, ‘European data privacy regulation on a global stage’ and Eliot Posner, ‘Institutional financial regulatory cooperation’ in Zeitlin, above n. 386.

³⁹² See Katja Biedenkopf, ‘EU chemicals regulation’ in Zeitlin, above n. 386 Also, Joanne Scott, ‘From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction’ 57 (2009) *American Journal of Comparative Law* 897.

³⁹³ Scott, above n. 2.

³⁹⁴ InDivEU, above n. 1.

³⁹⁵ Ibid.

³⁹⁶ InDivEU, above n. 1, p. 36.

study. It is also notable from the point of view of WP6 that our investigation into external differentiation as a legal phenomenon threw up some interesting examples of situations in which the EU is willing to treat sub-national units within third countries differently. For example, it is open to the EU to recognise that a ‘third country, a territory or one or more specified sectors within that third country’ ensures an adequate level of data protection, such that transfers of personal data from the EU may take place.³⁹⁷ While the concept of a ‘territory’ is not defined, it has been recognised by leading commentators that this is capable of including a sub-national unit within a state.³⁹⁸ These examples of what may be considered to be territorially differentiated unilateral external differentiation are relevant for the discussion of Brexit in WP6.

In order to facilitate linkages between WP2 (‘The legal feasibility and constitutional acceptability of differentiated integration’) and WP6 (‘DI beyond the Member States: External and Regional Differentiation’), we include a list of examples of territorially differentiated external differentiation in Annex II. We hope that, as the InDivEU project proceeds, additional examples may be identified for inclusion in this list.

³⁹⁷ GDPR, n. 229 above, Article 41(1).

³⁹⁸ See especially Christopher Kuner, Lee A. Bygrave, Christopher Docksey & Laura Dreschsler (eds.), *The EU General Data Protection Regulation: A Commentary* (OUP, 2020), p. 786. This conclusion is also supported by the sentence structure of Article 41(1) and Article 45(3). While the EU adopted an adequacy decision in relation to the Faroe Island which is a self-governing community within the Kingdom of Denmark, albeit that it concluded that the Faroe Islands can be considered a third country as opposed to ‘a territory’ for this purpose. Commission Decision 2010/146 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection provided by the Faeroese Act on processing of personal data, <http://data.europa.eu/eli/dec/2010/146/oj>. See also 2004/411/EC:Commission Decision of 28 April 2004 on the adequate protection of personal data in the Isle of Man, <http://data.europa.eu/eli/dec/2004/411/oj>; and 2008/393/EC: Commission Decision of 8 May 2008 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Jersey, <http://data.europa.eu/eli/dec/2008/393/oj>. The Isle of Man and Jersey are dependencies of the British Crown, enjoying independence in all areas except international relations and defense. The Commission explicitly considered them to be third countries for the purpose of these adequacy determinations.

Annex I – Centre of gravity

<i>Type of agreement</i>	<i>Name of agreement</i>	<i>Centre of gravity</i>	
		<i>Mechanism</i>	<i>Scope</i>
Multilateral	European Common Aviation Area	Direct adoption + homogeneity	Narrow
	Energy Community Treaty	Direct adoption + homogeneity	Narrow
	European Economic Area	Direct adoption + homogeneity	Broad
Bilateral	Swiss Sectoral Agreements	Equivalence	Sectoral
	EU-UK Withdrawal Agreement	Direct adoption + homogeneity	Broad/time-limited
	Ankara Agreement	Binding approximation + Homogeneity	Moderate coverage
	AAs with Deep and Comprehensive Free Trade Area	Binding approximation	Broad
	Stabilisation and Association Agreements	Non-binding approximation +	Broad

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		directed cooperation	
	Euro-Med Association Agreements	Non-binding approximation + directed cooperation	Broad
	Enhanced PCAs	Binding approximation + directed cooperation	Moderate coverage
	PCAs	General cooperation	Moderate coverage
Institutional	Participation in EU agencies	General cooperation	Narrow
	Participation in EU programmes (Horizon 2020)	Direct adoption + binding approximation	Narrow

Annex II - Territorially differentiated unilateral external differentiation

Legal Act	Territorially differentiated external differentiation
<p>Data protection</p> <p>[Article 45 Reg. 2017/679 (GDPR); Article 36 2016/680; Article 47 Reg. 2018/1725; Article 57 Reg. 2018/1717; Article 81 Reg. 2017/1939]</p>	<p>EU recognition of the adequacy of the level of data protection ensured by ‘a territory’ [of a third country]</p>
<p>EU food safety law</p> <p>[Articles 126 & 127, Reg. 2017/625;</p>	<p>Animals or goods may be approved to enter the EU from a region of a third country</p>
<p>Animal products</p> <p>[Annex, Chapter III(C)(a), Comm. Dec. 94/723]</p>	<p>Hides or skins from animals may be approved to enter the EU from a region of a third country</p>

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With the support of the
Erasmus+ Programme
of the European Union

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