Core values beyond territories and borders: the internal and external dimension of EU regulation and enforcement

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I. INTRODUCTION

Nation-States exercise authority over their population in a certain territory. Traditionally they have competence to define the legal framework and rules for the functioning of society (prescriptive jurisdiction), the competence to enforce these rules (jurisdiction to enforce) and the competence to hold (legal) persons liable in case of non-compliance (jurisdiction to adjudicate). These triple jurisdictions include the Nation-States' monopoly over the use of power, including the power to punish (*ius puniendi*). The use of this power is granted by law, but also subject to the command and control by law. This control-restraint is the very essence of the rule of law and the 'Rechtstaat', as the Nation-State has to guarantee both the liberty and security of citizens.

In a political, economic and legal integration model, as the one of the European Union (EU), important competences of the Nation-State are transferred to the supranational level. The EU has been empowered through the EU Treaties with functional aspects of the three mentioned jurisdictions. The EU is based upon an integrated legal order and thus upon integration law, a composite of European supranational law and (harmonised) national law.[1] The result is that we can speak of an integration model that is based on shared sovereignty and shared governance. The EU is not only about prescriptive jurisdiction in a vertical setting, based on primacy of EU law. From the very beginning, the European Communities were aiming at establishing new common spaces and areas of integrated policies. The customs union, the internal market, the monetary union are all based on this notion of a common space with common rules. Internal borders were to be removed and thus borders of Member States were of no use anymore in relation to the free movement of persons, goods, services and capital. We could say that when it comes to the realisation of the internal market, for instance, the territories of the Member State are unified in a functional European territoriality. This European territoriality concept is only functional to the aims of the internal market and thus does not automatically trigger concepts of European federalism and European citizenship. Already in the 1980s it became clear that the functionality of this European territoriality could no longer be based solely upon the harmonisation of the policies and legislation of the Member States. The aims of the internal market could only be realised if they were also based on (a) horizontal cooperation between administrative authorities and enforcement authorities of the Member States in the common areas (horizontal regulatory and enforcement dimension) and (b) based on supranational governance and enforcement (vertical governance and enforcement dimension). This means that the realisation of the internal market has a triple instrumental dimension: 1. harmonisation of national policies and legislations; 2. horizontal regulatory and enforcement cooperation; and 3. vertical governance and enforcement dimension. While in the first dimension the territory of every single Member State remains the frame of reference, there is no doubt that the second and third dimension are strongly intertwined with the functional territoriality of the common area and its common

[1] L.F.M. Besselink *A Composite European Constitution* (Groningen: Europa Law Publication, 2007).

policies. The functional territoriality can be considered as a de-territorialisation from the perspective of the Member States, but is in fact a reconceptualisation of territory and borders within the internal market.

The deepening of European integration and the removal of internal borders, with the attendant regulatory and enforcement challenges, has taken place in various areas. Most contributions to this volume have drawn attention to the ‘Europeanisation’ of such economic fields as public procurement, contracts, electronic communication services, aviation, competition law, financial services, and economic policy, where regulation, and at times even enforcement, have moved upwards to the EU level. As early as the 1980s, however, it became clear that European integration as such could not be limited to economic and financial issues. The increasing integration and mobility in the common area triggered other regulatory and enforcement policies dealing with migration, public order, crime control, and human trafficking. These policies were labelled as belonging to 'Justice and Home Affairs' (JHA), having its origins in the Schengen Treaties. The 1985 Schengen Treaty and the 1991 Schengen Implementation Treaty were political answers to an increasing demand to elaborate flanking measures to the European integration process. The Schengen flanking measures consisted not only in new common policies, dealing with migration, visa and crime control, but also in establishing a new common area: the Schengen area, the common territory of the Schengen States for which a Schengen Information System was established and for which certain common procedural guarantees were accepted, as for instance the Schengen *ne bis in idem principle*. The Schengen area was in fact the first common judicial area in the EU. This does not mean that national borders were completely removed, however. When it comes to police and judicial cooperation in criminal matters, the national jurisdictions remained the single source of reference and only in exceptional cases national authorities could operate in the territory of another Member State. Judicial operational powers thus remained linked largely with national jurisdiction and national applicable law. Even in the Schengen field, Member States can shut down and re-establish borders and border control in order to deal with urgent situations. Pursuant to the Amsterdam Treaty, the Schengen *acquis* was integrated into EU law and the Area of Freedom, Security and Justice (AFSJ), replacing JHA, was established as one of the main aims of EU integration. The AFSJ, further consolidated in the Lisbon Treaties, is based on the same triple instrumental dimension: (1) harmonisation of national policies and legislations; (2) horizontal regulatory and enforcement cooperation; and (3) vertical governance and enforcement dimension.

It is clear from this picture that open borders and functional European territoriality do not automatically lead to a redesign of the jurisdictions and applicable law of regulatory and enforcement agencies. The question remains, to which extent the horizontal regulatory and enforcement cooperation (second dimension) and the vertical governance and enforcement model (third dimension) have really reshaped the Nation-State-based authority-people-territory concept, or in other words if and if so, to which extent can the horizontal and vertical regulatory and enforcement agencies be defined as authorities with proper jurisdiction over its addressees (legal persons, citizens) in a new transnational territory? In the affirmative case, we have to address the question if and how core values of the rule of law, including the human rights protection of the European Charter of Human Rights (ECHR) and the EU Charter of Fundamental Rights (EUCFR), relate to this new political-legal reality of transnational authority. The core values, based on the rule of law, are necessary for the control-restraint on the use of transnational enforcement authority and for the attribution of rights and remedies to the persons concerned.

This functional concept of EU territoriality does not just pertain to the regulatory and enforcement relationship between the EU and its Member States. It also has an external dimension in that the EU is often perceived as a single territorial entity on which Member States have conferred competences to act externally. The EU (at the time the 'European Communities') has been a founding member of the World Trade Organization, can constitutionally conclude bilateral investment treaties with third countries,[2] and is currently negotiating a Transatlantic Trade and Investment Partnership with the US. It has observer status at the United Nations (UN), enjoys special 'full participant' status in a number of important UN conferences,[3] and has taken part in important multilateral initiatives, such as the Kimberley Process with respect to conflict diamonds. By thus participating, as a composite territorial actor in global governance, the EU promotes some of its core values in accordance with Article 3.5 of the Treaty on European Union (TEU), which lays down the values and interests which the EU upholds and promotes in its relations with the wider world.[4]

This externalisation of territoriality is not only effectuated through bi- or multilateral action, but also through unilateral action whereby the EU subjects foreign economic operators to EU regulation so as to spread its core values and protect the effectiveness of its internal regulation. It is well-known that EU competition law and its enforcement by the Commission does not stop at the EU's borders: the Commission has the power to bring EU competition law to bear where foreign or international cartels or mergers affect (consumers in) the EU internal market. As early as 1988, the European Court of Justice considered this practice to be based on the international law principle of territoriality, insofar as it was grounded on territorial implementation of a cartel or merger through direct sales in the internal market.[5] The EU subsequently entered into a number of horizontal cooperation or 'comity' arrangements with third countries so as to limit jurisdictional conflict between countries, and prevent multiple enforcement of competition law against one single economic operator.[6] In more recent times, territory has served to justify the enforcement of an ever increasing number of EU Regulations and Directives against foreign economic operators that wish to access the EU market. These instruments have conditioned trade with, and the exercise of, economic activities within the EU, on foreign operators complying with stringent legal requirements that take into account performance outside *EU* territory, e.g. as regards the provision of financial services, the importation of tropical timber, or the surrender of

[2] Article 207 TFEU.

[3] See for a discussion of the relationship between the EU and the UN, J. Wouters, F. Hoffmeister, T. Ruys (eds) *The United Nations and the European Union: an Ever Stonger Partnership* (The Hague: TMC Asser Press, 2006).

[4] 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 protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

[5] CJEU 22.09.1988 *The Wood Pulp Case, A. Ahlstrom Osakeyhtio v. Commission* Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, ECR 5193. See also CFI 25.03.1999 *Gencor Ltd v. Commission* Case T-102/96, ECR II-753, upholding the 'effects doctrine' in matters of merger control.

[6] See notably the Agreement Between the European Communities and the Government of the United States of America on the Application of the Positive Comity Principles in the Enforcement of their Competition Laws, (1998) OJ L 173/28; (1999) 4 CMLR 502; Agreement between the EU and Japan concerning cooperation on anti-competitive activities, (2003) OJ L 183/12 and the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, (1999) OJ L 175/50; Memorandum of Understanding on cooperation between the Korean Fair Trade Commission and the Commission's DG Competition (2004); terms of reference of the EU-China competition policy dialogue (2004).

emissions allowances in the aviation sector. While nominally based on territoriality – the rules only apply to economic operators accessing the EU market – these rules spread core EU values relating to transparency, safety and sustainability, at a universal level. Indeed, to limit transaction costs, foreign operators may tend to integrate EU requirements into their universal operations. This 'territorial extension' may raise issues of jurisdictional overreach and even extraterritoriality, especially if the EU rules are enforced without taking into account circumstances in the operator's country of origin, or the risk of transnational operators being subject to multiple regulatory burdens.

It is the aim of this contribution to shed light on how the concept of territory reshapes the regulation and enforcement of EU law. This territorial perspective is not, and cannot be, isolated from the perspectives embraced in the other horizontal contributions to this volume: core values, authority, and citizenship. After all, territory, authority and citizenship are the basic elements of the concept of governance. One cannot do without the other lest governance no longer be governance. In a thick understanding of governance, the concept inevitably also involves the projection of certain core values shared by a reflexively governed community.[7] Therefore, this contribution aims to integrate the other related perspectives and links them back to territory. Authority, for one, is concerned with the adoption of norm-setting and enforcement of policies at the European and national levels of government, a definition which immediately invites questions with respect to the *locus* of authority (the EU, the Member States, or both), and the territorial scope of the exercise of authority. Citizenship, for another, pertains to membership in a legal order, which is necessarily spatially or personally bounded: one is a citizen of a particular legal order because one entertains links with that order which another person does not. Territory, as well as nationality, have been the classic markers of such – necessarily exclusionary – citizenship. Thirdly, core values, as defined in Gerbrandy and Scholten's contribution, are those multiple (legal) values which function as standards of normative evaluation, are not instrumental and which are inherent in the shared European-national legal order.

Territory shapes values, but values also shape territory, namely where values are invoked to contest territorial or transboundary regimes, or their adverse consequences. In this respect, this contribution will draw particular attention to the impact of horizontal and vertical regulatory and enforcement cooperation on the control-restraint under the rule of law and the enjoyment of individual rights as core values – and core elements of citizenship – of the EU.

The structure of this contribution is as follows. Section 2 explores the changes which functional territoriality has undergone with respect to the regulation and enforcement of the internal market, in particular the financial market. Section 3 investigates how horizontal and vertical cooperation, especially as regards law enforcement within the EU, have changed territoriality in the AFSJ. Section 4 demonstrates that the internal EU dimension of territoriality may need to be complemented by an external dimension to fulfil its true potential. Section 5 concludes.

II. THE INTERNAL MARKET PERSPECTIVE

[7] Political reflexivity can be understood as legislation enacted in a process of collective self-legislation. See H. Lindahl *A-Legality: Postnationalism and the Question of Legal Boundaries* 73 Modern Law Review pp. 30-31 (2010).

The single or internal market is the oldest and most important example of a functional territoriality concept in the EU. To visualise it, we can zoom in on the free movement of capital in the internal market, especially in the area of the financial markets. The EU has not only removed barriers to the free movement of capital in the financial markets, but has also harmonised substantive policy fields of the financial markets, as the ones concerning securities, banking, insurances, etc. Creating integrated markets for these financial services is a core component of the European policy regulation in the area of financial services. The Markets in Financial Instruments Directive (MiFID)[8], the cornerstone and framework of the regulation of cross-border financial services in the internal market, retained the principle of EU 'passport', introduced by the Investment Services Directive (ISD), but replaced the former minimum harmonisation and mutual recognition by a standard of maximum harmonisation[9] combined with home state supervision. MiFID establishes a regulatory framework for the provision of investment services in financial instruments (such as brokerage, advice, dealing, portfolio management, underwriting etc.), for the operation of regulated markets by market operators. It also establishes the powers and duties of national competent authorities in relation to these activities. The 2014 Directive on Markets in financial instruments (MiFID2)[10] has imposed further obligations upon investment firms, in order to tackle fraudulent practices. Finally, additional regulation has been imposed upon credit institutions, dealing with prudential supervision, deposit guarantee schemes, winding-up procedures for credit institutions, etc.[11] However, the EU has not only regulated the financial markets by harmonising national policies and legislations (regulation: the first dimension), but also by setting up, in the Member States, financial services regulators (FSRs).[12] These FSRs do not only act as regulatory agencies and administrative enforcement agencies in the jurisdiction of their State, but also operate as a horizontal network in which enforcement information is shared and decisions are taken related to the investigation of infringements. The European Securities and Markets Authority (ESMA)[13], which replaced the Committee of European Securities Regulators on 1 January 2011, is a typical example of such a regulatory and administrative enforcement network. Another example can be found in the area of money laundering, where the Member States have been obliged by directives since 1991 to set up financial intelligence units (FIUs) that cooperate between each other in a network: the so-called EGMONT group. The EGMONT group is an enforcement network that is highly specialised in information exchange, but also interacts with enforcement activity through multilateral cooperation (based on EU directives as well as the Financial Action Task Force (FATF) recommendations of the G-20). In other words, they form a horizontal regulatory and enforcement network. It is clear that their competences are filled in by European law and do have a transnational effect in the internal market and also go beyond the borders and territories of national jurisdictions. The information sharing, building up of information positions at a horizontal level and investigative cooperation trigger many questions about core values related to the protection of privacy (Article 8 ECHR), the protection of personal data (Article 8 of the EUCFR), the procedural guarantees and defence rights (Article 6 ECHR and Articles 47-48 EUCFR), etc.

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[8] Directive 2004/39, L 145.1, 30.04.2004.

[9] O.O. Cherednychenko *Full Harmonisation of Retail Financial Services Contract Law in Europe: A Success or a Failure?* available at SSRN: http://ssrn.com/abstract=1702298 (9 October 2010).

[10] Directive 2014/65, L173/349, 12.06.2014.

[11] L. Quaglia *The politics of financial services regulation and supervision reform in the European Union* 46 2 European Journal of Political Research pp. 269–290 (2007).

[12] See contribution of Duijkersloot and van Bockel on the centralisation of enforcement as regards financial regulation.

[13] Regulation 1095/2010, OJ L 33/84, 15.12.2010.

In the internal market and in the financial markets, the impact of the EU is not limited to harmonisation and the setting up of horizontal networks (the second dimension: horizontal enforcement). The establishment of an increasing number of European regulatory and enforcement agencies in the area of the internal market is a perfect illustration of the vertical governance and enforcement dimension (the third dimension: vertical enforcement). In the area of financial markets, governance has even become a major issue after the 2007 financial crises. The EU has decided to vest European regulatory agencies with regulatory and supervisory powers. The European Central Bank (ECB), the European Banking Authority (EBA) and ESMA are the new trio in the field.[14] ESMA is thus not only a horizontal network, but also a vertical regulatory and enforcement agency. Concerning its regulatory powers it is certainly not the exception to the rule, as the regulatory powers of ESMA can be compared to those of the Office for Harmonisation in the Internal Market (OHIM), the Community Plant Variety Office (CPVO), the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the European Medicines Agency (EMA), and the Agency for the Cooperation of Energy Regulators (ACER), in the sense that it is ESMA itself which takes some of its decisions, without the intervention of the Commission.[15] The ESMA decisional power is interesting as it can not only prescribe and supervise obligations, but also take legally binding decisions directed at competent national authorities in emergency situations (Article 18 regulation), as well as at individual legal entities in case of disagreements between competent national authorities (Article 19 regulation). In this sense, the ESMA powers go beyond the regulatory powers of the other agencies and shift between regulatory and enforcement powers. This explains why the UK challenged the ESMA power, before the ECJ, to prohibit short selling on the financial markets.[16] However, the ECJ upheld the powers laid down in Regulation 236/2012 on short selling and certain aspects of credit default swaps[17], whereby ESMA disposes of intervention powers in exceptional circumstances (Article 28) that do not only include the imposition of conditions to short selling but also their prohibition.

The ECJ underlines that the EU legislature sought by Article 28 of Regulation No 236/2012, to provide an appropriate mechanism which would enable, as a last resort and in very specific circumstances, measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in those markets

> 114 The EU legislature therefore considered it appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances. Therefore, the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States.

[14] See http://www.ecb.europa.eu, http://www.eba.europa.eu, http://www.esma.europa.eu respectively.

[15] It is however astonishing that in the recent 2012 common approach of the European Parliament, the Council and the Commission (see Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, available at http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf,) the item of the (regulatory) powers of the agencies is not a separate issue of attention.

[16] Opinion of the Advocate of the Court of Justice 12.09.2013 *UK and Northern Ireland v. Council of the EU* Case C-270/12 available at http://curia.europa.eu/juris/document/document.jsf?docid=140965&doclang=EN.

[17] OJ L 86/1, 24.03.2012.

> 115 It should be added that, as stated in recital 33 in the preamble to Regulation No 236/2012, while competent national authorities will often be best placed to monitor and react immediately to an adverse development, ESMA should also have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the threat.

The ECJ does not only uphold the legislative frame for the vertical ESMA governance and enforcement powers, but links them directly to the *effet utile* notion in a transnational setting of the internal financial market. By doing this, it underlines the autonomous supranational enforcement powers of ESMA, be it in a complementary and urgent setting.

The discussion surrounding the ESMA enforcement powers is a clear-cut example of legal battles regarding the conditions for the conferral of regulatory and supervisory powers on EU agencies and thus also on the institutional balance and division of powers in a functional territoriality scheme.

Another example of an interesting European enforcement agency in the field of European finance is OLAF. It is an administrative investigative Union agency responsible for investigating irregularities, fraud, related corruption and money laundering that are affecting the EU budget (custom duties, VAT, subsidies, tendering, etc.). OLAF is competent to perform external investigations in the Member States and internal investigation in the EU institutions. In the recent OLAF regulation of 2013,[18] the administrative investigative powers are defined both in the regulation itself and by reference to specific regulations concerning on-the-spot checks[19] and inspections in the common agricultural policy.[20] Although these powers are thus laid down in EU regulations, when it comes to the execution they are strongly intertwined with national enforcement powers (the reach of the powers, enforcing cooperation of addressees, judicial warrants, etc.). The regulatory frame for external investigations by OLAF in the Member States offers a striking example. OLAF can exercise powers conferred on the Commission by Regulation 2185/96 (Article 1 of Regulation 883/2013). This means that OLAF can have access to the premises of economic operators, to invoices, computer data, samples, accounting documents, etc. (Article 7 of Regulation 2185/96). However, Article 7 submits this access equivalent to the powers of similar national inspectors. This means that the investigative powers of OLAF are conditioned to similar existing powers for similar administrative investigative agencies, if not, they are limited and inexistent. In cases of similarity, the OLAF powers are locked up by national law. Article 3(3) of Regulation 883/2013 also clearly states

> During on-the-spot checks and inspections, the staff of the Office shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in this Regulation.

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[18] Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 248/1, 18.09.2013.

[19] Regulation 2185/96 concerning on-the-spot checks and irregularities carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292/2, 15.11.1996.

[20] Regulation 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy, OJ L 67/11, 11.03.1991.

In case the economic operator is not willing to cooperate with the OLAF investigators (is giving no access to the premises, is not willing to deliver the access codes to the computer files, etc.), national authorities have the duty to assist OLAF (Article 7(3) of Regulation 883/2013). However, this assistance is completely governed by national law thus allowing the assistance to be limited by national regulations: the economic operator has the right to refuse cooperation in certain circumstances, or the cooperation has to be submitted to a prior judicial authorisation under national law (for instance forced access to business premises).

Both the ESMA and the OLAF example illustrate that the functional territory concept reshapes the regulatory and enforcement landscape: the actors (agencies), the set of rules (applicable law) and their scope of action and legal consequences. However, many of the new arrangements are a combination of national, horizontal and vertical constructions filled in by a mix of European and national applicable law.

The enforcement powers of ESMA and OLAF also raise questions to procedural safeguards and defence rights, both under the ECHR and the EUCFR. These safeguards are traditionally linked with the investigative powers under the applicable national law. In case the ECHR is imposing higher standards, they do apply in every single jurisdiction of the ECHR State Party and not in a transnational functional territory, as the one of the internal market. When ESMA and OLAF act transnationally, which standards do they have to apply? These procedural safeguards are partially enshrined in the EU regulations. Article 9 in the recent 883/2013 OLAF Regulation is a good example of it, as it contains a substantial set of safeguards linked to the pre-trial investigation. However, this set is only a partial harmonisation. What happens if an economic operator is obliged to deliver documents that are self-incriminating? Can the evidence thus obtained be used in the OLAF reports and later on in the national follow-up in punitive proceedings, which might be triggered in other jurisdictions? The new functional territorial concepts have not been translated yet into a transnational approach when it comes to the related procedural safeguards. This could be the great added value of the EUCFR, when the ECJ would be willing to use general principles of Union law in relation to fair trial and rights of the defence (Articles 47-48 EUCFR), or in relation to the protection of privacy of economic operators (Article 8 EUCFR). An aspect that remains largely untouched by the EUCFR is the control-restraint. The design of check and balances in the legal and jurisdictional control on the use of ESMA and OLAF powers remains an unknown area. It is however clear that a control-restraint based on a classic approach of the effects of these powers in the national territories does not take into account the transnational effects of these powers.

III. THE PERSPECTIVE OF THE AREA OF FREEDOM, SECURITY, AND JUSTICE (AFSJ)

When we zoom in on the criminal law dimension of the AFSJ, we can first identify a high level of prescriptive harmonisation of national substantive criminal law (much less criminal procedure). The regulatory dimension of the EU consists in setting substantive criminal law standards to combat serious transnational crimes, the so-called euro crimes, as terrorism, organised crime, trafficking in human beings, cybercrime, counterfeiting etc. The standards deal with the definition of the offences and the reach of the national jurisdictions. Added to this, the EU has started to harmonise in the field of criminal enforcement of EU policies, for instance to protect, also by the use of criminal enforcement, the financial markets, the

environment, the financial interest of the EU, the single currency, etc.[21] The substantive harmonisation of market abuse and insider trading is a good example of this second approach, in this case dealing with criminal law enforcement in the financial internal market.[22] Beside the first dimension of harmonisation of national criminal enforcement, mostly dealing with substantive criminal law, there has been a strong regulatory harmonisation of judicial cooperation in criminal matters/mutual recognition (MR). The regulatory frame deals both with tools of mutual legal assistance (MLA) (extradition, gathering evidence abroad, confiscation of assets, etc.), as well as with cooperation mechanisms in case of conflict of jurisdiction. While in principle, EU Member States' jurisdiction to adjudicate and enforce has remained fully national, over the last few years, cooperation mechanisms have been put in place to limit conflicts of adjudicatory jurisdiction, as well as to allow for investigations outside the territory. The 2009 Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings,[23] and the 2014 Directive on the European Investigation Order, one of the recent MR tools of judicial cooperation, will be discussed in turn.[24] The emphasis of the analysis lies on how such European cooperation affects Member States' territorial sovereignty to adjudicate and investigate, while at the same time not going to the detriment of core EU values, fundamental rights in particular. Both are good examples of the second dimension: horizontal regulation and enforcement, as both aim at strengthening the cooperation between national judicial authorities. In 2009, the Council adopted a Framework Decision to prevent and settle conflicts of adjudicatory jurisdiction between EU Member States in criminal proceedings. This Framework Decision provides for a procedure to limit jurisdictional conflicts that could result from more than one Member State exercising jurisdiction over the same situation or person. In an era of transnational crime, such concurrent jurisdiction is hardly inconceivable. The one and same person may well be sought by a variety of Member States grounding their jurisdiction on (objective/subjective) territoriality, (active/passive) personality, security, or universality. As under general international law, there is no hierarchy of jurisdictional principles,[25] the risk of normative competency conflicts between different States, and of an individual being prosecuted multiple times, looms large. It is the latter rather than the former concern which animates the Framework Decision, which in its Preamble provides that 'the very aim of this Framework Decision is to prevent unnecessary parallel criminal proceedings which could result in an infringement of the principle of *ne bis in idem*'.[26] Accordingly, the Framework Decision appears to be directly informed by the desire to protect the core EU value of fundamental rights that could be compromised as a result of a multitude of territorial sovereigns each legitimately asserting their jurisdiction.

The Framework Decision does not require Member States to waive or to exercise jurisdiction (unless they wish to do so),[27] thus leaving intact the exercise of jurisdiction under domestic and international law. That being said, it puts in place a number of mechanisms to promote

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[21] J.A.E. Vervaele, The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy? in M. Ulväng and I. Cameron (eds) Essays on criminalization & sanctions pp.185-225 (Uppsala: Iustus Förlag, 2014).

[22] M. Luchtman and J.A.E. Vervaele, Enforcing the market abuse regime: Towards an integrated model of criminal and administrative law enforcement in the European Union? 5 New Journal of European Criminal Law pp. 192-222 (2014).

[23] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328/42, 15.12.2009.

[24] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 03.04.2014 ('EIO Directive').

[25] C. Ryngaert *Jurisdiction in International Law* p. 129 (Oxford: Oxford University Press, 2008).

[26] Council Framework Decision 2009/948/JHA, preambular paragraph (12).

[27] *Ibid.*, preambular paragraph (11).

closer jurisdictional cooperation between Member States, and to avoid parallel proceedings, through obligations to contact, reply, and to enter into consultations,[28] with a view to ultimately grant jurisdictional priority to the State with the strongest connection to the case. This connection is case-specific and depends on a number of factors,[29] but territorial link appears to be the most important one.[30]

The Framework Decision is a fine example of how States coordinate the exercise of their adjudicatory jurisdiction, and thereby fill a gap left by general international law, pursuant to which there is no hierarchy of permissive principles of jurisdiction. On the basis of the Decision, States may not be required to relinquish the jurisdiction they have, but they *are* required to reflect on whether it is also appropriate to actually exercise this jurisdiction, taking into account the face of potentially stronger claims by other States, and potential violations of the due process rights if defendants face double jeopardy in multiple jurisdictions (as reflected in the *ne bis in idem* principle).[31] The preferable outcome of such reflection and the ensuing consultations, is then that criminal proceedings with respect to one and the same case are concentrated in one Member State. In the near future this coordination mechanism may be supplemented by binding decisions of Eurojust concerning negative and positive conflicts of jurisdiction, as Article 82 of the Treaty on the Functioning of the European Union (TFEU) provides for a legal basis.

Such territorial concentration of adjudicatory jurisdiction not only requires consultations about the appropriate jurisdiction, but also cooperation as regards evidence that may well be located *outside* of the territory of the State exercising its adjudicatory jurisdiction. In this respect, the 2009 Framework Decision, stated that 'specific attention should be paid to the issue of gathering the evidence which can be influenced by the parallel proceedings being conducted',[32] without however specifying how such evidence could be gathered, in particular outside the Member State's territory. The 'extraterritorial' gathering of evidence in the EU has now received a boost by the adoption, by the Parliament and the Council, of a Directive regarding the European Investigation Order (EIO) in Criminal Matters (2014). Pursuant to this Directive, one Member State can order one or several specific investigative measure(s) carried out in another Member State to obtain evidence.[33] While the Directive does not abandon territoriality – the State issuing the EIO is not allowed to single-handedly carry out the order outside its territory –[34] there is no denying that the flexible procedure set out in the Directive, based on the principle of mutual recognition, allows one Member State to have an investigative order carried out outside its territory without many formalities having to be complied with. Indeed, the executing State – the State on whose territory the EIO is carried

[28] *Ibid.*, Articles 5, 6, 10.
[29] *Ibid.*, Article 11.
[30] See *ibid.*, preambular paragraph (9), citing firstly 'the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities for securing its surrender or extradition to other jurisdictions', and only secondly 'the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur'.
[31] *Ibid.*, Article 10(1).
[32] *Ibid.*, preambular paragraph (4).
[33] *Supra* note 24.
[34] *Ibid.*, Article 9(5) ('The authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing State and to the extent agreed between the issuing authority and the executing authority.'). But see *Ibid.*, Article 9(4) ('The issuing authority may request that one or more authorities of the issuing State assist in the execution of the EIO in support to the competent authorities of the executing State.').

out – is under an *obligation* to 'ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State (lex forum), unless that authority decides to invoke one of the [limited] grounds for non-recognition or non–execution' provided for in the Directive.[35]

This Directive accordingly limits Member States' territorial sovereignty in that it nuances the time-honoured prohibition of extraterritorial enforcement jurisdiction laid down in the 1927 *Lotus* judgment of the Permanent Court of International Justice.[36] Although the Directive does not allow States to take enforcement measures on the territory of another State, it does provide that States are *bound* to take execution measures at the simple request of another State. This means that the *Lotus*-based exclusivity of territorial enforcement jurisdiction is, as such, no longer a valid defence to oppose the execution of extraterritorial enforcement measures.

This limitation of territorial sovereignty is ultimately based on the core EU value of mutual trust between the Member States, which translates into mutual recognition of each other's judicial decisions, in the case pre-judgment decisions concerning investigation and evidence-taking. Earlier, based on the same principle, an EU regulation had already provided for the enforcement of decisions made in other Member States.[37]

The core EU value of mutual recognition with respect to the EIO is counterbalanced, however, by far-reaching safeguards with respect to another core EU value, the value of human rights, and the due process rights of the suspect in particular, which risk being trampled upon if territorial sovereignty and the attendant sovereign control rights are relaxed. The preamble of the EIO Directive is peppered with references to the prevailing effect of human rights, in tandem with the Directive giving pride of place to human rights. It explicitly provides that non-compatibility of the execution of an EIO with the principle of *ne bis in idem*, with Article 6 TEU and with the EUCFR, is a ground for non-execution of the EIO.[38] In terms of remedies, it stipulates that 'Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO',[39] and allows an individual to challenge, in an action brought in the executing State, the substantive reasons for issuing an EIO on grounds of incompatibility with fundamental rights guarantees.[40] The proof of the pudding obviously remains in the eating, but these safeguards go a long way to ensure that the receding relevance of 'enforcement' territoriality does not lower the level of accountability and human rights protection in criminal proceedings.

The Framework Decision on adjudicatory jurisdiction and the EIO Directive epitomise the horizontal dimension of regulatory and enforcement criminal cooperation within the EU, i.e., cooperation between EU Member States that is facilitated, and even mandated by the EU. Such enhanced horizontal cooperation should not draw attention away from the increasing role of *European enforcement agencies* played in the criminal justice dimension of the AFSJ (the third, vertical dimension). Within the Justice and Home Affairs Policy and the AFSJ, the

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[35] *Ibid.*, Article 9(1). See Article 11 for the grounds for non-recognition or non-execution.

[36] PCIJ 07.09.1927 *SS Lotus*, *France v. Turkey* PCIJ Reports, Series A, No. 10 (1927) pp. 18-19.

[37] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20.12.2012**;** Council Framework Decision No. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States**,** OJ L 190/1, 28.06.2002.

[38] Article 11(1)(d) and (f) of the EIO Directive.

[39] *Ibid.*, Article 14(1).

[40] *Ibid.*, Article 14(2).

European Union has been increasingly concerned with the creation of enforcement networks, as the European Judicial Network (EJN) and Eurojust[41], and the setting up of a European Public Prosecutor's Office (EPPO)[42]. In the field of the AFSJ, Article 86 TFEU contains the legal basis for the establishment of an EPPO to investigate and prosecute offences in the field of the protection of the financial interests of the EU, a field that could be extended to serious transnational crimes, such as the trafficking of human beings, organised crime, terrorism, etc. In June 2013 the Commission submitted to the Council its proposal for a regulation.[43]

The horizontal EJN has no real investigative powers and is mostly used as a tool to strengthen the mutual legal assistance between judicial authorities of the Member States. Eurojust is another story, as its organs, the national members and the College have powers to coordinate investigations and possess powers (although not yet binding) related to the choice of jurisdiction. Under Article 85 TFEU, Eurojust has been entrusted with a European mission and could also be vested with powers to initiate investigations and to take binding decisions on jurisdictional issues. In June 2013, the Commission submitted to the Council its proposal for a new Eurojust regulation, which refers clearly to a European Union Agency[44].

The EPPO would be an enforcement agency based on a vertical model in the sense that it would obtain full investigative powers to investigate certain serious offences in the common territory of the Member States (European territoriality). However, although Eurojust and the EPPO qualify as EU authorities, their legislative design is highly decentralised and integrated into the institutions and regulatory regimes of EU Member States. Eurojust, for instance, acts through its national members, whereas the EPPO is proposed to act through its national Delegates, which apply mostly national law. *In concreto*, when it comes to the legislative design of the empowerment, there is great hesitation as to the reach of their powers, the territorial application of their powers, the judicial review (*ex-ante* authorisation and/or *ex-post* review by national and/or European judiciary) and the applicable human rights/procedural safeguards in a transnational setting within the AFSJ. Supranational designs can be based on European territoriality and European-wide investigative powers, but they still have to be embedded in the national justice systems (decentralised). Do European powers apply to the national members of Eurojust or to the Delegate Public Prosecutor or do national powers apply or a combination of both? What does this mean for the applicable human rights standards in the transnational territory? Are they defined at a European or national level? Is there joint responsibility of Member States and the EU for guaranteeing rights of the defence and fair trial rights in relation to the pre-trial investigation? Who is competent for the ex-ante and ex-post judicial review? The uncertainty regarding the applicable law and jurisdictional reach of the investigative powers does not only lead to great legal ambiguity as to the enforcement powers that can be used and their modalities, but also to increasing conflicts of law when it comes to applicable safeguards and judicial review in the AFSJ. To be more precise, in which law enforcement authorities have to deal with the increase of transnational crimes, but also with the increase of national crimes that need transnational cooperation to investigate, prosecute, adjudicate or execute. The national empowerment of European Agencies is not only problematic from the point of view of the agencies, as they have to function with a patchwork of national regimes and cultures, but also from the point of view of the addressees of the enforcement in criminal matters: suspects, witnesses, victims. Their

[41] See http://eurojust.europa.eu.
[42] See http://eurojust.europa.eu.
[43] Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534, available at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=1041110.
[44] Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM(2013) 535 final, available at http://www.statewatch.org/news/2013/jul/eu-com-eurojust-com-535-13.pdf.

civil rights and liberties depend on discretionary and arbitrary choices in the patchwork which could result in forum shopping and a race to the bottom of the lowest protective denominator of safeguards.

IV. THE ENTWINING OF INTERNAL AND EXTERNAL TERRITORIALITY

Previous sections depicted how EU regulation and enforcement have a transnational effect in the internal market, as they go beyond the borders and territories of the national jurisdictions of the Member States. Legislative harmonisation reshapes the national regulatory and enforcement framework. Horizontal regulatory and enforcement networks have come into being, and some institutions have obtained autonomous supranational enforcement powers on the basis of which they can intervene in Member States' territorially delimited policy space. These three dimensions of EU regulation and enforcement challenge the way we have traditionally viewed territory and internal borders in the EU.

What is often overlooked, however, is a fourth dimension: evolutions at the level of internal EU territoriality also have an impact on, and even necessitate, *external* forms of EU territoriality, or *vice versa*, namely that the external action of the EU compels adjustments in the conceptualisation of internal territoriality. For definitional clarity, internal territoriality, as sketched above, pertains to the relationship between the EU and its Member States, whereas external territoriality pertains to the relationship between the EU and its Member States on the one hand, and the wider world on the other.

Internal EU regulation and enforcement necessitate territorial externalisation where the regulatory purpose of, and the integrity of, EU legislation and the EU's enforcement capabilities risk being undermined by unscrupulous or unregulated foreign economic operators that are active in a global market. Such operators may drive strictly regulated EU-based competitors out of the market or impel them to relocate (regulatory avoidance or arbitrage), thus undercutting the EU's potential to reach the regulatory goal it has set for itself, e.g., reducing greenhouse gas emissions, providing aviation safety, or strengthening financial stability. Especially, where problems are global and essentially de-territorialised, territorially delimited regulation may not serve its purpose. Granted, such problems are ideally addressed through multilateral regulation, supervision, and enforcement. But in the absence thereof, the EU may contemplate applying, within certain limits, notably via a territorial link, its internal laws to foreign activity which adversely affects the effectiveness of EU regulatory aims. Put differently, translated in the terms used in this volume, internal regulatory territoriality needs an external dimension to be fully effective in realising core EU values, such as sustainability, safety, and stability.

In the typical scenario, this territorial externalisation takes place through the EU conditioning territorial access to EU markets on an economic operator satisfying certain standards, also when it operates abroad, and by including performance abroad in assessing whether the operator meets EU regulatory targets.

Joanne Scott has adroitly characterised this method of regulation and enforcement as the 'territorial extension' of EU law,[45] rather than genuine extraterritoriality. It remains no less true, however, that this technique allows the EU to export its own standards and core values

[45] *Ibid.*

on which these are based,[46] notably where third States or international organisations fail to impose and enforce adequate standards in respect of transnational economic operators' activities.[47] Arguably, this exportation of core values could be characterised as a core value in itself, in accordance with Article 3.5 TEU.

The emphasis of the analysis in this section lies on the regulatory rather than enforcement dimension. It is of lesser relevance here by what European authority - an EU agency or a national authority implementing EU law – the pertinent EU regulation is enforced. This will depend on the subject-matter and the attendant *internal* EU institutional architecture. For instance, national port authorities as decentralised enforcement agencies of EU law may block the entry into port of a foreign-flagged vessel which does not meet the regulatory requirements set by EU law. What is key for our purposes is that the territorial nexus of a particular situation triggers the application of EU law *and* allows enforcement measures to be taken. To take our port State control example again, the docking of a foreign-flagged vessel in an EU-based port triggers the application of EU law (in the sense that EU law would not apply if this vessel did not dock in an EU port), as well as allowing enforcement measures to be taken by the port State implementing EU law, such as the imposition of fines or other penalties, entry prohibitions, or orders to leave.

The technique of 'territorial extension' of EU law is not just an abstract concept, but has also been resorted to in practice. The EU has subjected air carriers to an EU flight ban on the basis of the carrier's *worldwide*, rather than just EU safety profile and performance,[48] and it has required that foreign individuals and legal persons, such as seafarers, timber importers, investment fund managers, credit rating agencies, and ship inspection and survey organisations wishing to work in the EU, have adequate foreign training and a proper foreign track record, and/or be subject to proper supervision in their home country.[49] Perhaps more intrusively, an EU Directive (the Aviation Directive) has required operators to surrender emissions allowances for purposes of the Emissions Trading System (ETS) for all flights which arrive at or depart from an aerodrome situated in the territory of a Member State even

[46] See on the international benchmarking effect of EU standards: A Bradford *The Brussels Effect* 107 1 Northwestern University Law Review p. 68 (2012).

[47] It appears that the EU is successful in imposing such standards because the EU is a lucrative market the economic opportunities of which foreign economic operators are not willing to forfeit. Having balanced potential profits and regulatory burdens, such operators ultimately decide to access the EU market *in spite of* rather than *because* of EU regulation, although, obviously, the entrenchment of the rule of law in the EU serves as a pull-factor for inward investment. Note that low levels of regulation, e.g., of labour or environmental conditions, or corporate law standards, can under certain circumstances serve as pull-factors to attract economic activities. See on environmental regulation, e.g., K. Holzinger and T. Sommerer, *"Race to the Bottom" or "Race to Brussels"?: Environmental Competition in Europe* 49 Journal of Common Market Studies p. 315 (2011); and on social dumping: C. Barnard *Social Dumping and* the *Race* to the *Bottom: Some Lessons for* the *European Union from Delaware?* 25 European Law Review p. 57 (2000).

[48] Articles 2 and 3 of Regulation 2111/2005, OJ L 344/15, 15.12.2005.

[49] The EU has required that seafarers comply with relevant international standards when serving on EU-registered ships, even if these seafarers come from abroad and serve on ships outside EU waters. In practice this means that the EU passes judgment on the training and certification system of a non-EU State. See Article 19(1) Directive 2008/106. See also Article 37(2) Directive 2011/61, which conditions non-EU fund managers' access to the EU market on their previous conduct in relation to individual investment decisions or transactions, as well as on the firm and the firm's country of origin meeting the non-transaction-specific conditions laid down in the Directive. See also Article 14(1)(b) of Regulation 391/2009, conditioning the performance of activities by ship classification societies in the EU on their meeting a number of criteria and obligations concerning the worldwide activity of the society. See also Article 4(5) and Article 5 of Regulation 1060/2009, requiring that a third country credit rating agency be certified by the EU. See also Article 4(3) of Regulation 995/201, which obliges third country operators marketing timber in the EU, to ensure supply chain transparency and to make use of a due diligence system maintained by a monitoring organization that has been recognised by the EU.

in respect of the emissions generated outside EU airspace.[50] This Directive has been challenged before the ECJ by foreign air carriers on the ground that it was extraterritorial and violated the customary law principle of non-intervention. The plaintiffs were however rebuffed by the Court, which considered the arrival or departure from an EU aerodrome to be a sufficient territorial nexus for the exercise of territorial jurisdiction.[51] Still, apparently due to concerns over jurisdictional overreach, the decision was taken to restrict the geographical scope of the Directive mainly to flights between aerodromes in the European Economic Area (EEA), awaiting a multilateral solution at the International Civil Aviation Organization (ICAO).[52]

It is observed that such territorial extension of EU law is not absolute: insofar as operators are subject to adequate or equivalent regulation abroad, they may not be subject to territorial law, on the ground that compliance with foreign law meets the regulatory targets the territorial regulator has set.[53] This strategy appears to be based on international comity and on the desire to accommodate private operators who would otherwise be subject to multiple regulation. Also, such territorial extension-based jurisdiction is meant to be only temporary: it pushes the envelope internationally and is withdrawn, or at least not exercised, when an acceptable foreign or global regulatory solution is reached, or enforced, *.i.e.*, a solution that provides protection that is at least equivalent (although perhaps not identical) to the protection that EU law provides.[54]

Territorial extension of EU law may at first sight appear rather uncontroversial as it is grounded on an indisputable territorial link. It remains no less true, however, that the EU considers this link as a trigger to exercise nearly-universal jurisdiction in that it subjects the operator's worldwide activities, including those taking place *outside the territory* to territorial

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[50] Article 3(b) Directive 2008/101, amending Directive 2003/87, including Annex I, OJ L 8/3, 13.01.2009.

[51] Grand Chamber of the Court of Justice 21.12.2011 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATA)* Case C-366/10, OJ C 49/7, 18.02.2012. See for a critical discussion: G. De Baere and C. Ryngaert *Air Transport Association of America and the EU's Contribution to the Strict Observance and Development of International Law* 18 European Foreign Affairs Review pp. 389-409 (2013).

[52] Regulation (EU) 421/2014 of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, OJ L 129/1, 30.04.2014.

[53] Article 18(1) Directive 2008/101 (requiring the EU to take into account foreign efforts to reduce the impact of aviation on climate change, to provide exemptions, and to enter into negotiations with other States); Article 19(2) Directive 2008/106 (deferring to third country whose training and certification system meets all the requirements laid down in the Seafarer's Training, Watchkeeping and Certification Convention); Article 37(2) Directive 2011/61 (providing that non-EU Alternative Investment Fund Managers may be released from the requirements under the Directive to the extent that it would be impossible for them to combine compliance with EU and non-EU law, subject to the requirement that the conflicting foreign law provides an equivalent rule having the same regulatory purpose and offering the same level of protection to investors in the relevant fund); Commission Implementing Regulation 859/2011 security air cargo and mail (with respect to exemptions offered in case of equivalent regulation in third countries); Article 5(6) of Regulation 1060/2009 (requiring that a third country Credit Rating Agency be authorised or registered in a country that has been recognised by the EU as having a legal and supervisory framework equivalent to that of the EU); Article 3 of Regulation 995/2010 (exempting importers from strict EU requirements where the imported timber conforms the standards laid down in a Voluntary Partnership Agreement concluded between the third country and the EU).

[54] Note that sometimes foreign law is adequate, at least on paper, but it is not adequately enforced. This has informed the adoption of the EU Timber Regulation, which in essence enforces foreign law by conditioning EU market access on compliance with it: Article 4(1) Regulation 995/2010 prohibits the placing of illegally harvested timber or timber products on the EU market, and defines illegal as illegal under the law of the country of origin. This Regulation indirectly puts pressure on local authorities to more stringently enforce their own legislation.

law. This territorial regulator then effectively supplants regulation and enforcement by other regulators, who may in fact have a stronger nexus to the situation, e.g., the home State regulator of the foreign economic operator. Such regulatory intervention may then give rise to international strife, as the adoption of the EU's Aviation Directive has shown.[55] Even if it does not lead to strong protest, territorial extension of high regulatory standards may be unfair towards developing countries, who may face more difficulties in meeting and enforcing these standards. As far as environmental regulation is concerned, for instance, it may be in tension with the fairness principle of common but differentiated responsibilities, pursuant to which industrialised nations have more far-reaching responsibilities than developing nations to meet global standards of environmental regulation.[56] From the perspective of the foreign operator, it may be argued that it can escape such regulation by foregoing operations in the EU. Economically, however, since the EU is a leading export or economic market, it may not have this choice. *De facto*, the operator will then be required to comply with EU regulation in its worldwide operations lest it be subject to stringent EU enforcement measures. It is obvious that this raises its compliance costs substantially.

This goes to show that the EU uses *territory* as a 'hook' to regulate situations that have (at least partly) *extraterritorial* dimension. In addition, the EU does not shy away from enforcing such regulation by denying non-compliant operators access to lucrative EU markets – although such enforcement has not always gone unchallenged. It becomes clear then that this concept of territory challenges our traditional notion that States each have sovereignty over their own territory, and can accordingly exercise prescriptive and enforcement jurisdiction to the exclusion of other States. By territorially extending its own regulation through market access conditions, the EU in fact encroaches on the regulatory autonomy of third States, and in so doing, 'exports' its own core values, such as financial transparency, industrial safety, and environmental protection, in ways the US has done in the past.[57] However counterintuitive this may sound, EU *territoriality* serves as a trigger to spread EU core values *extraterritorially*. Or put differently, the EU challenges the *horizontal* structure of the international legal order, based on the sovereign equality of nations: it substitutes for an absent multilateral regulator and enforcer and thus vicariously exercises quasi-*vertical* power. Concurrently, it acknowledges the *horizontal dimension* where it defers to foreign regulatory and enforcement mechanisms insofar as these provide equivalent protection.

The mechanism of territorial extension has been devised to protect the integrity of internal EU territorial regulation. Internal territoriality thus determines external territoriality. Conversely, external territoriality could also impact on internal territoriality, notably where the EU's participation in a multilateral framework necessitates a reconceptualisation or adaptation of the internal dimension of territoriality to ensure the effectiveness of the EU's international commitments. Where the EU signs up to an international agreement, its treaty partners may consider it as a separate territorial entity that should not be allowed to hide

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[55] See, e.g., United States: European Emissions Trading Scheme Prohibition Act 2011 (H.R. 2494); Joint Declaration of the Moscow Meeting on the Inclusion of International Civil Aviation in the EU-ETS. Going by the wording of these documents, it appears that foreign nations' protest is informed by the desire to protect trade interests rather than by the opinion that the jurisdictional assertion violates international law, in particular the principle of non-intervention.

[56] See in respect of the Aviation Directive: J Scott and L Rajamani *EU Climate Change Unilateralism* 23 European Journal of International Law p. 469 (2012).

[57] See for a critical analysis of the U.S. legal policy in this respect: A. Parrish *Reclaiming International Law from Extraterritoriality* 93 Minnesota Law Review p. 815 (2009).

behind its constituent members to escape compliance.[58] This means that the EU should ensure *internally* that its *external* commitments are duly honoured, also where the Member States implement EU law. This is not the place to discuss in detail how EU-negotiated treaties become binding on the Member States, and how the EU monitors Member State compliance with such treaties.[59] Rather, in light of the thrust of this volume and our contribution, we would like to demonstrate, by using an example, how the EU's internal territorial implementation of an external EU commitment to spread core EU values could run into trouble, and how this trouble could be remedied through enhanced EU supervision and support, as well as clever circumvention of the limitations of internal territoriality.

The example which we have chosen pertains to the implementation of the EU's participation in the Kimberley Process Certification Scheme (KPCS), an international initiative aimed at stemming the transnational flow of conflict diamonds. The EU joined this initiative out of a desire to further a core EU value, to wit, the prevention of international conflict, also outside the EU's territory. In so doing, it gave effect to the external dimension of EU territoriality, bearing in mind that the other KPCS participants considered the EU as a single territorial entity, without internal borders, to which Member States have conferred external action competences. The scheme could obviously not be successful without implementation by the participating entities. Thus, the EU implemented the KPCS throughout the entire territory of the EU, by subjecting the importation into, and exportation out of the EU to a certification scheme, so as to avoid distortion of competition between the Member States.[60] Such regulation inevitably raises implementation complications, as for enforcement purposes the EU – externally perceived as a single territorial actor – is crucially dependent on its Member States, which remain, despite their transfer of competences to the EU, territorial actors in their own right. Such problems of application or enforcement of EU law are obviously not limited to the implementation of the EU's international commitments. In fact, such problems are almost inherent to the decentralised structure of EU law application and enforcement. Most unfortunately, divergent Member State practice may lead to the weakening of rights and the distortion of competition between economic operators.

As regards the KPCS, the EU is dependent on Member State authorities to actually control the importation and exportation of diamonds, and Member States decide on taking sanctions in accordance with their national laws. It comes as no surprise that such decentralised or 'territorial' enforcement creates enforcement leaders and laggards, which may ultimately undermine the realisation of the humanitarian value – international conflict prevention – on which the EU's participation in the KPCS is based. Here, the internal aspect of territoriality undermines the realisation of its external dimension. It is obvious that only by strengthening internal territorial enforcement capacity can the EU truly conduct itself as a responsible external territorial actor. Yet it is equally obvious that the EU may only have limited means at its disposal to call to account the internal territorial actors – the Member States. It bears

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[58] Article 27(2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 *ILM* 543 (*1986*) ('An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty').

[59] See, e.g., R. Wessel The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities in A. Dashwood and M. Maresceau (eds) Law and Practice of EU External Relations: Salient Features of a Changing Landscape pp. 145-180 (Cambridge: Cambridge University Press, 2008).

[60] See Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds 2002 OJ L358/28, 31.12.20.12.

emphasis, however, that, in spite of a disappointing start, the EU has been rather successful in coaxing all its Member States into compliance for KPCS purposes.[61]

Internal EU territoriality, in fact, takes on additional significance with respect to the KPCS, as the initiative considers the EU as a single territorial entity. As a result, the KPCS does not apply to cross-border movement *within EU territory*, which ultimately remains governed by internal EU law. Under EU law, restricting the flow of conflict diamonds on the EU's territory – between Member States – is legally problematic, as it runs counter to the basic tenets of the freedom of movement of goods in the EU.[62] This raises the spectre of conflict diamonds being smuggled into the EU, and then being moved from one Member State to another without any control. The EU has found an ingenious way out, however, by relying on industry self-regulation: private regulatory initiatives can be listed by the EU if sellers and buyers can adequately certify that the diamonds are conflict-free, whether or not these sales are transnational.[63] This goes to show that the EU uses a smart mix of regulatory measures (central/decentralised, public/private) to wed external with internal territoriality, so as to ensure that diamond flows destined for, or passing through its territory, are regulated with a view to realising the *EU value* of preventing conflict that takes place outside its own territory.

The EU's participation in the KPCS may be a modest success story. The EU has managed the conflict between internal and external territoriality, and has projected its own values abroad. Still, its zeal to defend its values within its territory is not always matched by a willingness to project these same values outside the EU. Human rights, for instance, may assume a prominent place in EU constitutional law,[64] but, for reasons of political expediency, they may take a back seat in EU external relations – even if the EU has constitutionally taken it upon itself to promote them outside the EU's territory.[65] The EU's attitude towards the KPCS is a case in point: in spite of pleas from civil society, the EU has not used its leverage within the KPCS to extend the initiative's scope to include not only the trade in diamonds fuelling conflicts, but also the trade in diamonds produced in a manner which violates *human rights*. Unfortunately, this failure has undermined the legitimacy of the KPCS in a time of declining civil wars in southern Africa.[66] It appears, accordingly, that the EU has not fully realised the potential held by the KPCS to externally promote its internal, territorially-grown values. This may be informed by concerns over regulatory overreach, or by the concern of being perceived as an imperialist actor, although it is perhaps more likely that business interests have stood in the way of a more forceful defence of human rights within the KPCS.

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[61] F. Schram *The legal aspects of the Kimberley Process* International Peace Information Service p. 17 (2007).

[62] Note that the restriction of the *international* conflict diamond trade is based on a waiver under the GATT. See Waiver concerning Kimberley Process Certification Scheme for rough diamonds, WTO general Council, WT/L/518, decision of 15.05.2003, granting certain WTO member States a waiver from obligations under paragraph 1 of Article I, 1 of Article XI, and 1 of Article XIII of the GATT 1994 for the period 01.01.2003 until 31.12.2006, which was then extended from 01.01.2007 until 31.12.2012 by the decision of the WTO general Council WT/L/676 of 15.12.2006 and from 01.01.2013 to 31.12.2018 by the decision of the WTO general Council WT/L/876 of 14.12.2012, available at http://docsonline.wto.org.

[63] See *supra* note 60, Article 17.

[64] See CFEU, which in accordance with Article 6(1) TEU has the same legal value as the Treaties.

[65] Article 3(5) TEU.

[66] See the controversy over Zimbabwe's Marange mines, the NGO Global Witness leaving the KPCS, and Belgium lobbying the EU to lift mining sanctions earlier taken against Zimbabwe See Statement by EU High Representative, Catherine Ashton, on the agreement reached in Kimberley Process regarding Marange diamonds done at Brussels, 01.11.2011, A 439/11 and Statement by the spokesperson of EU High Representative Catherine Ashton on the outcome of the Plenary meeting of the Kimberley Process in Washington held at Brussels, 30.11.2012, A 552/2012, available at www.consilium.europa.eu.

In any event, the participation of the EU in an international regulatory initiative like the KPCS demonstrates that some obstacles posed by internal territoriality have to be overcome to make such participation successful. Internally indeed, the EU is not a single territorial entity, but depends heavily on Member States' enforcement of EU regulation. Various sticks and carrots may then have to be used to address the potential enforcement deficit that results from this institutional set-up. However, the EU may also be hampered externally in promoting its values to the fullest extent, as Member States may successfully lobby with EU institutions against regulatory extension or stringent enforcement, citing national or business interests connected with their territory. Accordingly, the EU's external core-value informed action influences its internal processes, while internally developed EU core values may critically inform the scope of the EU's external action. Or to put it more succinctly, the external and internal dimensions of territoriality reciprocally influence each other, with EU core values serving as the transmission belt.

V. CONCLUDING OBSERVATIONS

In political geography, it is widely acknowledged that state territoriality as the chief vector of world public order is an artificial construction, reflecting and furthering a particular political agenda that is historically contingent.[67] The concept of European territoriality is similarly artificial, or 'functional', designed to further particular European regulatory preferences. As these preferences evolve over time, so does the concept of European territoriality. Since the inception of the EU (at the time the EEC), a gradual thickening of European territoriality can be witnessed, with national laws being substantively harmonised through EU law (first dimension), national law enforcement agencies cooperating at a horizontal level (second dimension), EU agencies directly imposing and enforcing EU law (third dimension), and the EU conducting its external relations as if it were one territorial entity (fourth dimension). These evolutions speak to a deepening of EU integration and a reconceptualisation of territoriality: while the regulatory and enforcement power of the territorially delimited nation-state does not disappear, it has to confront an increasingly assertive Union whose functional powers are marked by an understanding of territoriality as a distinctly European, rather than just state-based, notion. Internally, the direct binding powers of European enforcement agencies in the field of financial and economic regulation, *vis-à-vis* Member States and individuals, are probably the most far-reaching example of such European territoriality. Externally, the participation of the EU in various multilateral frameworks, and the EU's territorial extension of its legislation, have led outsiders to perceive the Union as a regulatory force to reckon with, and a single territorial entity that reshapes the classic notion of the territories of the Member States.

This contribution has shown that this reconceptualisation of territory is not without its problems. In particular, the political checks and balances that come with 'simple' state-based territoriality may not be replicated at the European level. This leads to European Agencies promulgating EU legislation which lacks democratic content, and enforcing such legislation across Member States' borders with little regard for the hard-fought individual liberties –

[67] J. Ruggie *Territoriality and Beyond: Problematizing Modernity in International Relations* 47 International Organization pp. 139, 151-152 (1993) (arguing that the 'modern system of states is socially constructed'); R. Ford *Law's Territory (a History of Jurisdiction)* 93 *Michigan Law Review* pp. 843, 929 (terming territorial jurisdiction an 'invention').

which are among the core values of the European project. Externally, this managerial logic risks informing a practice of rather scant respect for other states' prerogatives and of foreign operators' interests, where EU legislation is imposed on the, at times worldwide, activities of foreign economic operators wishing to access the EU's territory – thereby compromising the core value of economic globalisation which is dear to the EU. It remains an open question whether reclaiming core European values that are threatened by creeping EU territoriality, both internally (*vis-à-vis* the Member States and transnationally active EU citizens) and externally (*vis-à-vis* foreign nations and internationally active operators), is a challenge to which the EU can measure up. Externally, the EU's willingness to soften the impact of its legislation on foreign operators, on the basis of mutual recognition / equivalence, bodes well in this respect. Unfortunately, such optimism may not be called for at the level of internal enforcement by EU Agencies, who have not yet showed signs of taking the rights of individuals caught in their claws seriously.