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Régis Bismuth

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Régis Bismuth

Professor at Sciences Po Law School

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ABSTRACT

When it had to deal with the extraterritoriality of others or to circumscribe or justify the jurisdictional limits of its laws, the European Union has often cloaked itself in the flag of international legality and has underlined the duty to comply with principles of State jurisdiction under international law. A closer analysis of the EU experience of extraterritoriality nonetheless shows a hiatus between the EU legal discourse and its practice. Indeed, the EU has tended to accommodate the extraterritorial pretentions of other states and has also tended to justify its own extraterritorial practices, mostly on the basis of an extensive understanding of the territorial principle. More broadly, this chapter also highlights not only the blurring distinction between extraterritoriality and territoriality but also the more liberal stance the EU has adopted over the last years as regards connecting factors justifying the application of its laws.

KEYWORDS

extraterritoriality, European Union, Brussels Effect, territorial extension, territorial principle, EU extraterritoriality, jurisdiction to prescribe, connecting factors, customary international law, discourse on extraterritoriality

1 Introduction

This chapter examines the European Union (EU) experience of extraterritoriality and more specifically the question as to whether the EU has, explicitly or implicitly, in its law, practice or discourse, a (coherent) stance on the matter. The concept of extraterritoriality should be understood in the context of this study in a narrow jurisdictional sense as the application of rules (jurisdiction to prescribe or jurisdiction to adjudicate) to a situation or conduct occurring abroad and not involving nationals.[1] In this light, the approach followed in this chapter is distinct from recent influential scholarship seemingly relevant to the issue of the extraterritoriality of EU law.

Anu Bradford's book *The Brussels Effect – How the European Union Rules the World* explores various strategies illustrating 'the EU's unilateral ability to regulate the global marketplace'[2] despite the absence of a fully-fledged political federation. The author intends, however, to make a clear distinction between on the one hand the 'extraterritoriality or territorial extension' on the basis of which the EU seeks to apply its regulations to foreign actors and, on the other hand, the 'market-driven harmonization associated with the Brussels effect.'[3] While this seminal contribution has, in our view, some broader ramifications with the issue of extraterritoriality, it does not intend to constitute a substantial contribution to the matter. The extraterritoriality of EU law does not *per se* generate a *Brussels Effect* and the *Brussels Effect* does not necessarily stem from extraterritorial regulations.[4]

Marise Cremona and Joanne Scott have also envisaged a broader phenomenon of the 'global reach of EU law' encompassing the (*stricto sensu*) extraterritorial application of EU law, the 'territorial extension' of EU law, the so-called 'Brussels-effect' as well as the impact of EU's external relations either as a result of its bilateral relationships or of its engagement with multilateral fora.[5] Although it is interesting to debate whether the concept of 'territorial extension of EU law'[6] has something to do with the one of extraterritoriality, that study focuses more on the ways through which EU law is used as an instrument of EU external relations and is not directly related to the issue of whether the EU has a stance about extraterritoriality, its jurisdictional limits and those of third states – the issues we also intend to address in this chapter.

When it had to deal with the extraterritoriality of others or when it had to circumscribe or justify the jurisdictional limits of its laws, the EU has often cloaked itself in the flag of international legality and the duty to comply with principles of State jurisdiction under international law (Section 2). A closer analysis of the EU experience of extraterritoriality, both as an addressee of extraterritorial practices and generator/author of extraterritorial disciplines, has nonetheless shown somehow a hiatus between the EU legal discourse and its practice. Indeed, as an

[1] Extraterritorial jurisdiction to enforce as well as cases of universal criminal and civil jurisdiction will not be considered. On these aspects, see Lena Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) Max Planck Institute Luxembourg for Procedural Law Research Paper Series N° 2022(1) 9.

[2] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 1.

[3] Ibid 68.

[4] See also, Cécile Rapoport, 'A la recherche des frontières de l'extraterritorialité du droit de l'Union européenne' in Edouard Dubout, Francesco Martucci and Fabrice Picod (eds), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021) 24–25.

[5] Marise Cremona and Joanne Scott (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (First Edition, Oxford University Press 2019) 1.

[6] First coined by Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 The American Journal of Comparative Law 87.

addressee, the EU has tended to accommodate the extraterritorial pretentions of other states and, more importantly, it has also tended to justify its own extraterritorial practices, mostly on the basis of an extensive understanding of the territorial principle (Section 3). The chapter then concludes by highlighting, in light of the EU experience, not only the blurring distinction between extraterritoriality and territoriality but also the more liberal stance the EU has adopted over the last years as regards connecting factors justifying the application of its laws (Section 4).

2 An apparent initial reluctance towards extraterritoriality (the EU as a 'willing victim')

Although the EU has more recently implemented some form of extraterritoriality, its discourse on the matter – of its law-making organs and of the Court of Justice – has seemingly remained constant. Indeed, whether as norm-maker or as an addressee of the extraterritoriality of third states, the EU has constantly bothered to point out the necessity to comply with international law principles on State jurisdiction.

2.1 As an addressee of the extraterritoriality of others ('inward extraterritoriality')

It is clearly as an addressee of the extraterritoriality of other States, especially of the United States, that the EU has taken very firm stances on the matter. In this regard, a distinction needs to be made between on the one hand cases of inevitable jurisdictional tensions between two regulatory blocks and on the other hand clear cases of questionable unilateral exercise of extraterritorial jurisdiction.

The EU and the US have experienced several jurisdictional conflicts in the context of the regulation of activities having a significant cross-border dimension, such as financial regulation. When the US, in the wake of the Enron scandal in 2000 adopted the Sarbanes-Oxley Act to improve corporate governance standards applicable to all US or foreign corporations listed on a US stock exchange, this legislative initiative met with criticism from Europe due to its extraterritorial reach. It was nonetheless acknowledged that those measures were also to address concerns having potential effects on US financial markets.[7] The same could be said about both US and EU measures adopted after the 2008 Global Financial Crisis concerning the regulation of derivatives and prudential regulation.[8] In most cases, those jurisdictional tensions have been progressively overcome through regulatory cooperation.

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[7] Hans-Jürgen Hellwig, 'The US Concept of Corporate Governance under the Sarbanes-Oxley Act of 2002 and Its Effects in Europe' (2007) 4 ECFR 417, 418.

[8] John C Coffee Jr, 'Extraterritorial Financial Regulation: Why E.T. Can't Come Home' (2014) 99 Cornell Law Review 1259; Johan Schweigl, 'Extraterritorial Effects of EU Financial Markets Laws' in Nuno Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the*

In a similar fashion, some EU Member States have first expressed some concerns as regards the extraterritorial reach of the US anti-corruption regime under the Foreign Corrupt Practices Act (FCPA) with prosecutions targeting European companies in relation to their activities abroad and which have resulted in significant fines.[9] Interestingly, after a first wave of criticism, some European States have themselves subsequently implemented similar domestic anti-corruption frameworks with a potential extraterritorial dimension[10] and established (albeit informal) cross-jurisdictional cooperation mechanisms with US authorities. It should also be noted that such legislative initiatives intend to implement the OECD anti-corruption convention[11] which promotes a broad interpretation of the territorial principle 'so that an extensive physical connection to the bribery act is not required.'[12]

The stance of the EU and its Member States has been eventually less conciliatory when they faced the extensive reach of US economic sanctions. It is more specifically in that area that they have condemned in the strongest terms the extraterritoriality of US law on the basis of international law principles on State jurisdiction.

As early as 1982, the European Community (EC) reacted vigorously to the economic measures prohibiting the US export of goods and technology for European companies involved in the Trans-Siberian Pipeline project with the USSR. Given that such sanctions aimed at regulating the conduct of non-US persons abroad, the EC declared that 'goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them.'[13]

A further step was taken in 1996 when the EC responded to US extraterritorial economic sanctions against Cuba (Helms-Burton Act) as well as Libya and Syria (d'Amato-Kennedy Act) which were also applicable to non-US persons concerning their dealings with these countries. The EC adopted a Blocking Regulation intended to protect against and counteract 'the effects of the extra-territorial application' of US sanctions.[14] In that regard, the Blocking Regulation

EU (Springer 2021); Joanne Scott, 'The New EU "Extraterritoriality"' (2014) 51 Common Market Law Review 1343, 1357. See also Matthias Lehmann's contribution to this volume.

[9] Régis Bismuth, 'Pour une appréhension nuancée de l'extraterritorialité du droit américain - Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas' (2016) lxi Annuaire Français de Droit International (2015) 785.

[10] Jonathan Bourguignon, 'France's New Approach Towards Extraterritorialityin Anti-Corruption Law: Paving the Way for a Protective Principle in Economic Matters?' in Régis Bismuth, Jan Dunin-Wasowicz and Philip N Nichols (eds), *The Transnationalization of Anti-Corruption Law* (Routledge 2021).

[11] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997.

[12] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997, Article 4 (paragraph 1).

[13] European Communities, 'Comments on the US Regulations Concerning Trade with the USSR' (1982) 21 International Legal Materials 891.

[14] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L 309/1.

provides that no judgment or decision giving effect to the aforementioned extraterritorial statutes shall be recognized or be enforceable in the EU,[15] that no person under EU jurisdiction shall comply with them.[16] The list of US extraterritorial sanctions targeted by the regulation has been subsequently updated after the reintroduction of extraterritorial sanctions against Iran following the Trump's administration decision to withdraw from the Iran Nuclear Deal in 2018.[17]

The preamble of the Blocking regulation explicitly points out that 'by their extra-territorial application, such laws, regulations and other legislative instruments violate international law.'[18] The regulation does not, however, give a detailed indication of the criteria of unlawful extraterritoriality. Neither does the Court of Justice of the European Union (CJEU) in its recent decision in *Bank Melli Iran* interpreting certain provisions of the Blocking Regulation and simply noting that these US extraterritorial law 'seek to govern activities of natural and legal persons which fall within the jurisdiction of the Member States.'[19]

Some details are provided in the diplomatic correspondence between EU and US institutions as regards the Helms-Burton Act involving Cuba. The EU stated that 'the extraterritorial extension of US jurisdiction is unacceptable as a matter of law and policy' and more specifically that the US 'has no basis in international law to claim the right to regulate in any way transactions taking place outside the US with Cuba undertaken by subsidiaries of US companies incorporated outside the US.'[20] The EU seemed therefore to reject foreign capital control as a relevant factor justifying the application of the law of the parent company to regulate the transactions of the subsidiaries abroad.

Interestingly, both the Blocking Regulation and the diplomatic correspondence also extensively refer to the adverse effects of these extraterritorial regulations on the interests of the EU[21]. The Regulation forbids persons under EU jurisdiction from complying with the listed extraterritorial US sanctions but this prohibition has been rarely enforced[22] and a waiver may be granted by the European Commission when 'non-compliance would seriously damage their interests or

[15] Regulation 2271/96 (n 14) Article 4.

[16] Regulation 2271/96 (n 14) Article 5(1).

[17] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 (n 14) [2018] OJ L 199 I/1.

[18] Regulation 2271/96 (n 14) Recital 4.

[19] Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* [2021] para 37 (ECLI:EU:C:2021:1035).

[20] 'Presidency of the European Union and the European Commission (5 March 1996)' (1996) 35 International Legal Materials 397, 398. See also, Charlotte Beaucillon, 'The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions' in Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021) 121.

[21] 'Presidency of the European Union and the European Commission (5 March 1996)' (n 20) 398. See also, Regulation 2271/96 (n 14) Recital 5.

[22] Report from the Commission to the European Parliament and the Council relating to Article 7(a) of Council Regulation (EC) No 2271/96, COM/2021/535 final (3 September 2021).

those of the [EU].'[23] Moreover, the EU has exercised some selectivity when condemning – or not reacting to – some US extraterritorial sanctions. One can therefore legitimately wonder whether the EU reluctance towards extraterritoriality is based on a consistent stance from a legal standpoint and/or broader policy considerations for safeguarding EU's economic interests.

2.2 As a norm-maker/regulator ('outward extraterritoriality')

There is *prima facie* a coherence between the EU stance as regards inward extraterritoriality and the one concerning its jurisdictional limits as a law-making power.

Article 52 of the Treaty on the European Union (TEU) and Article 355 of the Treaty on the Functioning of the European Union (TFEU) specify the territorial scope of application of EU treaties: the territory of EU Member States with specific rules concerning overseas territories. Those provisions – which shall be read in light of article 29 of the Vienna Convention on the Law of Treaties (VCLT) specifying that unless otherwise provided, a treaty is binding upon each party in respect of its entire territory[24] – were primarily relevant to determine the *ratione loci* scope of the rights and obligations of EU Member States.[25] However, the CJEU has relied on Articles 52 TEU and 355 TFUE to consider that 'in the absence of detail as to the territorial scope of an act of secondary legislation, that scope must be determined on the basis of those provisions, since the secondary legislation applies in principle to the same area as the Treaties themselves.'[26] This is why secondary legislation is per default applicable on the territory of EU Member States.[27] To some extent EU treaties encapsulate *prima facie* a presumption of territorial application of EU treaties – even though the Court has not always strictly followed that approach[28] and also noting that what is 'territorial' could be interpreted very broadly.

As discussed below,[29] this default rule concerning the territorial application of EU secondary legislation does not prevent the EU from adopting norms applicable outside the territory of the Member States. EU institutions have also considered that the potential extraterritorial reach of EU law must comply with international law principles governing State jurisdiction. Indeed, as pointed out in *Poulsen* and *Racke*, the EU 'must respect international law in the exercise of its

[23] Regulation 2271/96 (n 14) Article 5(2). See also Article 4 of Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 (n 14) [2018] OJ L 199 I/7.

[24] See also, Jimena Quesada, 'Article 52 TEU [Territorial Scope of the Treaties]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU) – A Commentary* (Springer 2013) 1434.

[25] Hornkohl (n 1) 8.

[26] Case C-17/16 *Oussama El Dakkak* [2017] para 23 (ECLI:EU:C:2017:341).

[27] Case C-265/19 *Recorded Artists Actors Performers Ltd* [2020] para 59 (ECLI:EU:C:2020:677).

[28] For instance for the application of Regulation 1/2005 on the protection of animals during transport 'for the stages of the journey which are to take place in the territory of third countries', see Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2015] para. 56 (ECLI:EU:C:2015:259).

[29] See *infra* Section 3).

powers' including international customary law.[30] In that regard, there is a significant difference between US and EU approaches to extraterritoriality.[31]

The role of international customary law has been later reaffirmed in *Air Transport Association of America* on the basis of TUE Article 3(5) which refers to the imperative for the EU to contribute to 'the strict observance and the development of international law.' This case dealt with the application of the EU emissions trading system to emissions from flights performed by operators departing from or arriving at airports situated in the territory of one of the EU Member States – even for emissions generated outside the airspace of EU Member States. The Court considered that the EU, in light of relevant principles of customary international law, had competence to adopt such a mechanism even when applicable to non-EU operators given the territorial nexus characterized by the physical presence of aircrafts on the territory of EU Member States.[32] Interestingly, the Court did not even mention the potential extraterritorial reach of the EU emissions trading scheme and Advocate General Kokott even went further when pointing out that it did not contain 'any extraterritorial provisions.'[33]

Both the positions of the Court and of the AG in *Air Transport Association of America* suggest a somewhat binary (and outdated) distinction between territoriality and extraterritoriality,[34] the latter being seemingly a curse word in the vocabulary of EU institutions.[35] This is also the case in the practice of the EU Council which has highlighted in its Sanctions Guidelines on restrictive measures that, unlike the US, 'the EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law'[36] and that 'EU restrictive measures should only apply in situations where links exist with the EU.'[37]

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[30] Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*. [1992] paras 9 and 10 (ECLI:EU:C:1992:453); Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] paras 45 and 46 (ECLI:EU:C:1998:293).

[31] See William Dodge's contribution to this volume.

[32] Case C-366/10 *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change* [2011] paras 121-130 (ECLI:EU:C:2011:864).

[33] Opinion of Advocate General Kokott in Case C-366/10 *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change*, delivered on 6 October 2011 (ECLI:EU:C:2011:637) paras 145 and 147.

[34] On the outdated dimension of this binary distinction, see Régis Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique' in SFDI (ed), *Extraterritorialités et droit international* (Pedone 2020) 113.

[35] See nonetheless, Opinion of Advocate General Jääskinen in Case C-507/13 *United Kingdom v Parliament and Council* delivered on 20 November 2014 (ECLI:EU:C:2014:2394) para 41 (pointing out that 'no such principle of international law against extraterritoriality as described in the United Kingdom's application exists')

[36] Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy (4 May 2018) para 52 available at: https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf

[37] Ibid. para. 51. The standard jurisdictional clause in EU restrictive measures programs provides that they shall apply ' (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union' (see ibid para 88).

The EU's apparent reluctance towards extraterritoriality should not be taken at face value and should not also eclipse the often significant extraterritorial reach of some EU policies which have been frequently justified on the basis of an extensive interpretation of the territorial principle.

3 An EU practice tending to amplify its 'outward extraterritoriality' (the EU as a 'soft perpetrator')

As Advocate General Jääskinen noted, 'an EU legislative measure cannot be invalid simply because it has effects on conduct in territory located outside of the EU.'[38] In that regard, 'the decisive element from an international law perspective is that the particular facts display a sufficient link with the State or international organisation concerned.'[39]. While the EU has highlighted the extraterritorial dimension of US practices to signal their doubtful legality under international law, but when EU law is at stake, the same extraterritorial dimension fades away. Instead, the emphasis is placed on the relevant links (and mostly territorial ones) with the EU when one of its measures is at stake. It is in this light that the concept of 'territorial extension' of EU law has arisen.

Many studies have been dedicated to the extraterritoriality or territorial extension of EU law. Some of them focus on specific areas of EU law (competition law, financial law, data protection, copyright law, human rights, private international law, etc.)[40] and others on the different criteria of territorial extension (presence, conduct, effects, anti-evasion, etc.) that are applicable in specific contexts.[41] In this chapter, it seems relevant to distinguish between two types of EU extraterritoriality: one necessary for the protection of specific EU interests (for instance data protection) and another aimed at the protection of global goals and/or non-EU persons abroad (for instance protection of human rights in global value chains). In the latter case, there could a spatial decoupling between on the one hand the jurisdictional hook triggering the application of EU law (for instance commercial presence in the EU) and on the other hand the non-EU interest to be protected abroad.

3.1 With regard to the protection of EU's specific interests

[38] Opinion of Advocate General Jääskinen in Case C-507/13 (n 35) para 36.

[39] Opinion of Advocate General Kokott in Case C-366/10 (n 33) para 149.

[40] Nuno Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law – The Application of EU Economic Law Outside the Territory of the EU* (Springer 2021); Edouard Dubout, Francesco Martucci and Fabrice Picod (eds), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021). See also, European Parliament, 'The Extraterritorial Effects of Legislation and Policies in the EU and US' (2012) EXPO/B/DEVE/FWC/2009-01/Lot3/03.

[41] Hornkohl (n 1).

When it comes to the prohibition of anticompetitive practices across the internal market, the safeguard of financial stability as well as the protection of depositors and investors in the EU, the protection of consumers and personal data of persons under the jurisdiction of Member States, or the production and preservation of electronic evidence in criminal proceedings in the EU, specific and subjective EU and Member States interests are at stake. Given the cross-border dimension of certain activities, EU law has inevitably been applied to conducts occurring abroad and involving non-EU persons. It is in this wider context that EU institutions have progressively developed certain triggers or justifiable grounds for the extraterritorial application of EU law.[42]

It is primarily in the field of competition law that the issue of the extraterritorial application of EU law arose. The CJEU has nonetheless long persisted in maintaining that its case law on anticompetitive practices, unlike the one related to merger control, was kept within the strict confines of the territorial principle.

Under Regulation 139/2004, a merger operation falling under EU jurisdiction must have a 'Community dimension' which is characterised if a transaction meets certain turnover thresholds, including minimum volumes of sales in the internal market.[43] In practice, the notion of 'Community dimension' has enabled the European Commission to exercise very broad territorial powers when it considered that the transaction, despite concluded abroad and involving non-EU businesses, had effects within the EU. In *Gencor* in 1999, the former Court of First Instance endorsed the 'effects doctrine'[44] and considered that characterizing the 'Community dimension' does not require that the undertakings be established in the EU[45] and that the quantitative thresholds 'rather ascribes greater importance to sales operations within the common market as a factor linking the concentration to the Community.'[46] Accordingly, the application of the merger control regulation 'is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.'[47]

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[42] Ibid 13.

[43] Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L133/1.

[44] Although there are debates as to whether the Court explicitly endorsed the 'qualified effects' doctrine or whether it was also combined with the 'implementation doctrine'; see Bernadette Zelger, 'EU Competition Law and Extraterritorial Jurisdiction – A Critical Analysis of the ECJ's Judgement in *Intel*' (2020) 16 European Competition Journal 613, 619; Emmanuelle Claudel, 'Territorialité vs extraterritorialité : Les affres du champ d'application dans l'espace du droit européen de la concurrence' in Edouard Dubout, Francesco Martucci and Fabrice Picod (eds), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021) 144; Francesco Martucci, 'L'extraterritorialité dans le droit de la concurrence – Etats-Unis et Union Européenne' in SFDI (ed), *Extraterritorialités et droit international* (Pedone 2020) 141.

[45] Case T-102/96 *Gencor Ltd v Commission* [1999] para 79 (ECLI:EU:T:1999:65).

[46] Ibid para 85

[47] Ibid para 90.

It took more time for the CJEU to endorse the effects doctrine in the area of anticompetitive agreements (TFEU Article 101) and abuse of a dominant position (TFEU Article 102).[48] In *Wool Pulp I* in 1988, the Court considered that focusing on the place where the agreement, decision or concerted practice was formed (i.e. abroad) 'would obviously be to give undertakings an easy means of evading those prohibitions'[49] and that 'the decisive factor is therefore the place where it is implemented.'[50] However, it denied that the 'implementation doctrine' had any extraterritorial dimension when it underlined that 'the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.'[51] As Advocate General Wathelet put it in a subsequent case, Articles 101 and 102 TFEU raise 'no issue of territorial jurisdiction from the point of view of public international law precisely because, given the way in which it is worded, it is quite simply not intended to be applied in any extra-territorial manner.'[52] An important step has been taken in 2017 with the *Intel* judgment. In this case, the Court went beyond clear evidence of EU-based implementation and which has solemnly recognized the relevance of the 'qualified effects test' which 'allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.'[53]

Interestingly, Advocate General Wahl pointed out in *Intel* that this evolution of the case-law is necessary to enable the Court to 'adjust it to present-day conditions, characterised by global economies, integrated marketplaces and elaborate patterns of trade'[54] – including of course the digital economy.[55] Ultimately, competition law has proven to be an interesting laboratory for the EU to develop new grounds and connecting links justifying the application of EU law to non-EU persons and in relation to their activities abroad.

'[D]ifferent varieties or degrees of extraterritoriality'[56] have also been implemented in the area of data protection and there are many ways through which EU data protection law is applied to situations occurring abroad.

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[48] Claudel (n 44) 146.

[49] Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1988] para 16 (ECLI:EU:C:1988:447).

[50] Ibid.

[51] Ibid para 18.

[52] Opinion of Advocate General Wathelet in Case C-231/14 P *InnoLux Corp., formerly Chimei InnoLux Corp. v European Commission*, delivered on 30 April 2015 (ECLI:EU:C:2015:292) para 37.

[53] Case C-413/14 P *Intel Corporation Inc. v Commission* [2017] para 49 (ECLI:EU:C:2017:632)

[54] Opinion of Advocate General Wahl in Case C-413/14 P *Intel Corporation Inc. v Commission*, delivered on 20 October 2016 (ECLI:EU:C:2016:788) para 280.

[55] Zelger (n 44) 625.

[56] Christopher Kuner, 'The Internet and the Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *Eu Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 124. See also more generally Cristopher Kuner's contribution to this volume.

In *Google Spain*, the CJEU has taken a fairly broad interpretation of the territorial scope of application of EU data protection law to ensure effective and complete protection of fundamental rights, more particularly the right to privacy. According to the Court, this right implies the right to obtain removal of certain search results on an internet search engine[57] – the so-called 'right to be forgotten' whose still debated territorial scope of application has been later discussed in *Google v CNIL*.[58] In *Google Spain*, the Court had to interpret Article 4(1)(a) Directive 95/46 (predecessor to the EU General Data Protection Regulation – GDPR)[59] which was applicable to the processing of personal data 'carried out in the context of the activities of an establishment of the controller on the territory of the Member State.' Google Inc., a US-based corporation, asserted that its Spanish subsidiary Google Spain was limited to the marketing of Google services and selling of advertising space and that its activities were not related to the operation of the search engine service. But the Court took an opposite view and considered that the activities of Google Inc., as the operator of the search engine that has its seat in a third State, and those of its establishment situated in the Member State 'are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.'[60] The Court's stance the matter implies a form of 'ascending extraterritoriality (i.e. exercising jurisdiction over the activities of the non-EU parent company).

The GDPR follows what Directive 95/46 prescribed[61] and has added a 'targeting criterion' specifying that it also applies 'to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union where the processing activities are related to … the offering of goods or services .. to such data subjects in the Union.'[62] This approach has also more recently been adopted in the proposed Digital Markets Act (DMA) which 'shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.'[63] This is also the case in the proposed regulation on

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[57] Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] paras 53-54 (ECLI:EU:C:2014:317).

[58] Case C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)* [2019] (ECLI:EU:C:2019:772). See, Federico Fabbrini and Edoardo Celeste, 'The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders' (2020) 21 German Law Journal 55.

[59] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[60] *Google Spain* (n 57) para. 56.

[61] GDPR (n 59) Article 3(1)

[62] GDPR (n 59) Article 3(2). See also, European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)' (2019) Version 2.1.

[63] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final (15 December 2020) Article 1(2).

markets in crypto-assets which nonetheless will be applicable only where third-country firms actively solicit clients or potential clients in the UE or promotes or advertises crypto-asset services or activities in the EU and not where crypto-asset services are offered at the own initiative of a person established in the UE.[64]

Interestingly, recent legislative initiatives have also attempted to impose on non-EU persons an *ex post facto* obligation of 'reterritorialization' when they offer services in the EU. This is the case of the proposed Digital Services Act (DSA) which would impose on service providers established in a third country that offer services in the UE to designate a sufficiently mandated legal representative in one of the Member States to allow for the effective oversight and enforcement of the regulation.[65] A similar obligation has also been introduced in the proposed e-evidence directive establishing an EU framework for the production and preservation of electronic evidence in criminal matters.[66]

This emerging obligation to appoint a legal representative in the EU when the service provider is a non-EU entity does not have the sole objective of recreating an official territorial link and avoiding accusations of extraterritoriality.[67] It also intends to facilitate the effective implementation of EU laws as well as the accountability of the foreign service provider without having resort to international judicial or administrative cooperation frameworks (mutual legal assistance treaties, etc.).

3.2 With regard to global objectives and the protection of non-EU specific interests

In the aforementioned areas of EU law (competition law, personal data protection, etc.) in which some form of extraterritoriality has been implemented, there is a specific and subjective EU interest at stake. There is also a rational link between the factor triggering the application of EU law (effects doctrine, targeting criterion, etc.) and the EU interest to be protected (competitive integrity of the internal market on which effects are felt, fundamental rights of persons under EU jurisdiction to whom services have been purposely provided, etc.). When it comes to global objectives such as climate change[68] and/or non-EU specific interests such as the protection of

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[64] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final (24 September 2020) Recital 51.

[65] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final (15 December 2020) Article 11.

[66] Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final (17 April 2018), Article 3.

[67] Régis Bismuth, '*Every Cloud Has a Silver Lining* : Une analyse contextualisée de l'extraterritorialité du cloud Act' [2018] JCP(E) 35, 40.

[68] Natalie L Dobson, *Extraterritoriality and Climate Change Jurisdiction – Exploring EU Climate Protection under International Law* (Hart 2021).

animal welfare abroad[69] and respect for human rights in global value chains,[70] there is in most cases a decoupling between the factor triggering the application of EU law (in general commercial activity in the EU) and the interest to be protected (for instance workers located abroad suffering from non-compliance with core labour standards).

The recent directive proposal on Corporate Sustainability Due Diligence (CSDD)[71] is particularly instructive to illustrate this decoupling. Its main objective is to protect human rights and the environment in global value chains with an explicit extraterritorial ambition when the proposal states for instance that it intends to promote 'decent work worldwide.'[72] It has an extraterritorial dimension in two different ways: it intends to indirectly regulate the conduct of EU companies' subsidiaries and subcontractors abroad and the due diligence obligation directly applies to non-EU companies (generating a turnover in the EU above a certain threshold[73]) concerning the activities of their subsidiaries and subcontractors abroad. In both cases, the proposal also tends to build upon an emerging practice of what could be labelled as 'extraterritoriality by contract' or 'extraterritoriality by private governance'[74] which already existed in the area of personal data protection.[75]

Interestingly, the directive proposal states that the turnover criterion 'should be chosen as it creates a territorial connection between the third country companies and the Union territory,' that it is 'a proxy for the effects that the activities of those companies could have on the internal market' and that 'in accordance with international law, such effects justify the application of Union law to third-country companies.'[76] It seems a far-fetched interpretation of the effects doctrine as it is questionable to consider that the conduct of non-EU companies abroad would have foreseeable, immediate, and substantial adverse human rights and environmental impacts in the EU. There is undoubtedly a territorial connection with the EU, but not directly to the conduct abroad to be regulated. We are consequently witnessing a decoupling between the

[69] See for instance, *Zuchtvieh-Export* (n 28).

[70] See, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (23 February 2022). '(CSDD Directive Proposal')

[71] Ibid.

[72] CSDD Directive Proposal (n 70) Recital 3.

[73] CSDD Directive Proposal (n 70) Article 2(2).

[74] These new tools of extraterritoriality have also been envisaged in the directive proposal which provides that companies shall integrate due diligence into all their corporate policies with 'a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries' (Article 5(1)(b)) (including those abroad) and shall prevent and address adverse human rights and environmental impacts through 'contractual assurances' from business partners which should be accompanied by appropriate measures to verify compliance along the value chain (Articles 7 and 8).

[75] The GDPR allows transfer of personal data to a third country if 'appropriate safeguards' are provided, including binding corporate rules in a corporate group or contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country; GDPR (n 59) Articles 46 and 47.

[76] CSDD Directive Proposal (n 70) Recital 24.

interest to be protected abroad and the connecting factor with the EU forum triggering the application of EU rules.

EU regulations aimed at addressing global objectives and protecting non-EU interests may be given (to some extent in second-line) an additional extraterritorial reach to protect specific EU interests, especially by promoting a level playing field and avoiding conditions of unequal competition between EU and non-EU economic operators. When the EU included civil aviation emissions in the EU Emissions Trading System, it decided to extend its application to non-EU operators even for emissions generated outside the airspace of EU Member States 'in order to avoid distortions of competition.'[77] The explanatory memorandum of the CSDD directive proposal also underlines that an Union legislation on corporate due diligence 'will lead to a level playing field where companies of similar size … are subject to the same requirements.'[78] This quest for a level playing field and the necessity to avoid distortions of competition between companies of different Member States as well as between EU and non-EU companies are more related to the proper functioning of the internal market (as a legal basis for the EU to exercise its internal competence by recourse to Article 114 TFEU)[79] than to a genuine territorial connection from an international law perspective. Indeed, those potential distortions of competition do not stem from the conduct occurring abroad to be regulated (environmental harm, human rights abuses, etc.) but from the choice of the EU to define a more or less broad scope of application of its laws. To some extent, the EU seeks to extend its extraterritorial reach to avoid EU companies being subject to more stringent and costly regulations in the internal market compared with those applicable on foreign corporations. In other words, it seeks to prevent eventually some form of regulatory arbitrage and eventually an easy way to evade those regulations.

Some broader observations may be made about the EU's emerging practice to regulate conduct occurring abroad not directly affecting EU's interests.

Recent initiatives, such as the CSDD directive proposal, appear to rely on some extraterritorial tools and techniques similar to those the US deployed in their economic sanctions programs the EU condemned in the past. The 2018 version of the EU Sanctions Guidelines indeed underline that the EU considers 'the extra-territorial application of third country's legislation … which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law.'[80] Earlier, in 1996, the EU considered that the US 'has no basis in international law to claim the right to regulate in any way transactions taking place outside the US … undertaken by subsidiaries of

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[77] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3, recital 16.

[78] CSDD Directive Proposal (n 70) 11.

[79] Ibid 12.

[80] Guidelines on Implementation and Evaluation of Restrictive Measures (n 36)

US companies incorporated outside the US.'[81] However, the CSDD directive proposal intends to regulate in some way transactions taking place outside the EU undertaken not only by subsidiaries of EU companies incorporated outside the EU but also of non-EU companies generating a certain turnover in the EU.

This signals – at least implicitly – that the EU's position on extraterritoriality has evolved. Indeed, it stems from recent EU initiatives that 'neutral' connecting factors ('neutral' in the sense that they can be used for different objectives) such as capital control or commercial presence as a basis for exercising jurisdiction over foreign persons to protect non-EU interests abroad are no longer considered *per se* as illegitimate grounds for asserting prescriptive jurisdiction. What eventually matters is whether the underlying interest to be protected can be linked to an overarching objective under international law.

In that regard, it is important to note that, unlike cases where an extension of jurisdiction is allowed under international law (for instance treaties allowing for universal jurisdiction or promoting a broad interpretation of the territorial principle)[82], international law neither explicitly forbids nor allows or advocates for extraterritorial jurisdiction in the areas of climate change or corporate social responsibility.[83] But the EU underlines that its initiatives seek to promote the implementation of recognized international standards on corporate social responsibility or international human rights and environmental treaties.[84] Despite their extraterritorial dimension also motivated by level playing field concerns, these EU initiatives cannot be regarded as purely unilateral moves such as those of the US in the area of economic sanctions where they have intended to unilaterally impose their foreign policy objectives in other jurisdictions.

4 Concluding observations

'Because seeing your bosom causes me grief.
Through one's eyes one's soul may be wounded,
And then sinful thoughts may grow unattended'

Molière, *Tartuffe*, Act III, Scene 2

[81] 'Presidency of the European Union and the European Commission (5 March 1996)' (n 20) 398. See also, Beaucillon (n 20) 121.

[82] Dino Kritsiotis, 'The Establishment, Change, and Expansion of Jurisdiction through Treaties' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 252.

[83] See for instance, Régis Bismuth, 'Deciphering and Revisiting the (Guiding) Principles on Business and Human Rights' in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019) 314. Nonetheless see, Dobson (n 68) 179.

[84] See for instance, CSDD Directive Proposal (n 70) 4, 9. See also (at 16) the explanatory memorandum underlying *inter alia* that 'the "material scope" is focused and structured mainly upon the corporate due diligence obligation and covers human rights and those environmental adverse impacts that can be clearly defined in selected international conventions').

Whether as a norm-maker or as an addressee of the extraterritoriality of third states, the EU has been insisting on the duty to respect principles of State jurisdiction. It is in this broader context that the notion of extraterritoriality, without even being precisely defined by EU law-making and judicial organs, has been given a pejorative connotation. A closer examination of EU practice nonetheless leads to nuance what could have been perceived in the first instance as jurisdictional puritanism and denotes that what is controversial is, above all, the extraterritoriality of others.

Indeed, in the context of the regulation of activities having a significant cross-border dimension and with the intention of protecting specific and subjective EU interests (competition law, personal data protection, etc.), the EU has developed new grounds for the extraterritorial application of EU law even though most of them are related to a very broad interpretation of what constitutes a relevant territorial connection. But the EU has stepped on a slippery slope and the connecting factors it has experienced in areas such as competition law or personal data protection – as well as new ones based on capital control or commercial presence – have also been used to give an extraterritorial reach in other regulations aimed at protecting the environment and human rights abroad. This has led to another 'extraterritoriality leap' with regulations eventually applicable to non-EU persons in relation to their dealings abroad with other non-EU persons. Without necessarily embracing all questionable aspects of US extraterritorial practices,[85] it is clear that the EU has progressively adopted a more liberal stance as regards connecting factors justifying the application of its laws; factors which once were considered as illegitimate under international law. What eventually matters in these new EU extraterritorial practices is whether the underlying interest to be protected abroad can be linked to a recognised objective under international law.

Interestingly, also, these recent initiatives aimed at protecting the environment and human rights abroad also indirectly intends to regulate international trade in goods and services. Indeed, such measures have an impact on the workforce, inputs and process technologies used in their production – what is usually labelled as Process and Production Methods (PPMs). The legality under WTO law of domestic measures (for instance restrictions on imports, standards on products, etc.) seeking to protect non-trade objectives and that have the extraterritorial effect of regulating PPMs abroad has been a source of much controversy.[86] It would be no exaggeration to say that these extraterritorial initiatives compelling EU and foreign companies to respect human rights and the environment in global value chains circumvent, to some extent, the potential jurisdictional limitations stemming from international trade instruments.

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[85] For instance as regards the so-called 'correspondent-account jurisdiction' aimed at targetting US-dollar denominated transactions in US sanctions programs. See, Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 Arizona Journal of International & Comparative Law 631, 654; Bismuth (n 9) 795.

[86] David Sifonios, *Environmental Process and Production Methods (PPMs) in WTO Law* (Springer 2018) 9; Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 20.