COMMON MARKET LAW REVIEW

CONTENTS Vol. 51 No. 5 October 2014

Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2014 [Volume 51, 6 issues] including postage and handling:
Print subscription prices: EUR 764/USD 1080/GBP 561
Online subscription prices: EUR 722/USD 1024/GBP 533
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at sales@kluwerlaw.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Associate Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Aims

The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted, together with a covering letter, to the Associate Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks.

Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text, *Except for the first note, giving the author's affiliation.The author should submit biographical data, including his or her current affiliation.

Further details concerning submission are to be found on the journal's website http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA

Common Market Law Review **51**: 1343–1380, 2014.

THE NEW EU "EXTRATERRITORIALITY"

JOANNE SCOTT*

Abstract

The established triggers for application of EU law – conduct, nationality and presence – are being supplemented by novel "extraterritorial" triggers that cause EU legislation to apply to conduct that occurs abroad. This is apparent in the area of financial regulation. EU legislation that relies on such triggers is neither self-evidently territorial nor extraterritorial, and it remains unclear whether it is consistent with the territorial principle of jurisdiction. Nonetheless, this legislation also usually includes "safety valves" in a bid to prevent jurisdictional over-reach and to facilitate cooperation between States. These safety valves should be viewed as of significance in assessing the legality of EU legislation that incorporates novel "extraterritorial" triggers.

1. Introduction

Faced with the increasing challenges of an interconnected world and of mitigating and managing the negative impacts within the EU of decisions and practices occurring in other parts of the world, the EU has developed a broad range of legislative techniques to regulate conduct that takes place outside the EU's borders.

In earlier work,[1] I argued that the enactment of extraterritorial legislation by the EU is extremely rare, but that the EU has frequent recourse to a legislative technique that I labelled "territorial extension". Territorial extension arises where the EU uses the existence of a territorial connection with the EU (notably, but not only, market access) to influence conduct that takes place outside the EU. For example, the EU makes the access of aircraft to its

* Professor of European Law, University College London. This paper forms part of a broader project exploring the global reach of EU law. Many thanks to Fergus Murray, Claire Kilpatrick, Gráinne de Búrca, Kenneth Armstrong, An Hertogen, Margaret Young, Rosa Lastra and Brendan Van Alsenoy for their helpful comments on earlier drafts, and to the editors. Thanks also to Frances Bodman for her excellent assistance in editing. Many thanks to the Leverhulme Trust which has supported this work through the award of a Major Research Fellowship (2012–2014).

1. Scott, "Extraterritoriality and territorial extension in EU law", 62 AJCL (2014), 87–126.

territory dependent on the worldwide safety record of the air carrier operating the aircraft in question and on the overall safety performance of the regulatory authorities in the air carrier's home State.[2]

The present paper takes this work further by shifting from a broad analysis of the substantive obligations contained in EU legislation to focus on the specific "triggers" that spark the application of EU law. For the purpose of this paper, a trigger is a mechanism that launches the application of EU law and delimits its personal and territorial scope of application. For example, the application of EU law may be triggered by the fact that a company is incorporated in the EU or by the fact that a company is listed on a financial market situated within the EU.[3]

Trigger selection often escapes intense political debate, but it bears heavily on the questions of who incurs obligations under EU law and who acquires rights. The focus of this paper is principally on the former question and is concerned exclusively with the exercise of prescriptive or legislative jurisdiction by the EU.

Traditionally, the EU has relied on three categories of trigger to justify bringing individuals within the EU's legislative or regulatory net: the fact that a person engages in conduct in the EU, the fact that a person is legally or physically present within the EU, or the fact that a person holds the nationality of an EU Member State. Whereas conduct and presence are strongly linked to the territorial principle, nationality forms a separate, well-established, jurisdictional base. In general, most EU legislation has recourse to these traditional triggers in order to guard against allegations of jurisdictional excess.

More recently, however, the EU has deployed legislative triggers that serve to extend the global reach of EU law and impose "over-the-border obligations" on non-EU persons in relation to conduct that takes place entirely abroad. The focus of this paper is on the emergence within the EU of novel "extraterritorial" triggers of this kind. I have placed, and will continue to place, the word "extraterritorial" within inverted commas in order to signal the ambiguous and contested status of these triggers in territorial terms.

2. Reg. 2111/2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, O.J. 2005, L 344.

3. To give a concrete example, the Commission's recent proposal to improve the gender balance among non-executive directors of companies listed on stock exchanges is directed only at companies that are both listed and incorporated in the EU. See COM(2012)614 final, Proposal for a Directive of the European Parliament and Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.

Where the EU has recourse to novel triggers of this kind, the line between territorial jurisdiction and extraterritorial jurisdiction becomes difficult to draw. While it is plain that the EU legislation in question regulates activities that take place abroad, what is not straightforward is the determination of whether the triggers that the EU is relying on should be understood as territorial or not. This is important because although the concept of extraterritoriality is often used as a slogan to cast doubt on the legitimacy of a measure without unpacking what exactly this means, the concept of territory has clear legal significance as well. Indeed, the territoriality principle is one of the most important bases for the exercise of prescriptive jurisdiction recognized by customary international law.[4] Consequently, where a measure is defined as extraterritorial, it will be unlawful unless an alternative, recognized jurisdictional base can be found.[5] The legal significance of territory in EU law is illustrated by the recent judgment of the ECJ in the *Air Transport Association of America* case. Here, the ECJ upheld the legality of a measure that encompassed conduct taking place outside EU territory, because the trigger for the application of the measure was territorial in that the legislation applied only to EU-arriving and-departing flights.[6]

Drawing on examples in EU legislation, this paper will argue that the distinction between territorial and extraterritorial legislation is often unclear. Those who are responsible for delimiting the boundaries of territorial jurisdiction are often required to make a judgment about jurisdictional reasonableness that entails a complex appraisal not only of the triggers included in a specific piece of legislation but also of the legislative measure as a whole. The paper suggests that the legitimacy and reasonableness accorded to the particular use of "extraterritorial" triggers, and indeed the characterization of a measure as extraterritorial or not, may have as much or more to do with the design of the measure as it does with the abstract nature of the triggers themselves. Moreover, an appraisal of relevant EU legislation makes it possible to identify a number of design features that militate in favour of accepting as legitimate "extraterritorial" legislation of this kind.

It is noteworthy that the emergence of these novel "extraterritorial" triggers in EU law is linked to the global financial crisis. They form part of an understandable legislative backlash against domestic, EU and global financial markets characterized by "light touch" regulation and the socialization of huge private losses through bail-out mechanisms, the costs of which are borne by the taxpayer. One impact of the global financial crisis and of the associated

4. For a discussion see section 5.
5. Ibid.
6. Case C-366/10, *Air Transport Association of America (ATAA) & Others* v. *Secretary of State for Energy and Climate Change*, [2011] ECR I-13755, paras. 131–130.

eurozone crisis has been to impress upon regulators the precariousness of the global financial system and the vulnerability of European banks to the systemic crises that arise in far-off and seemingly economically distant places.

My earlier work pointed to the emergence of territorial extension in such diverse fields as financial services, environment, aviation safety and security, maritime transport and climate change. However, for the time being, the incorporation of novel "extraterritorial" triggers into EU legislation seems to be confined to the financial services domain.[7] Nonetheless, as awareness of the availability and significance of these triggers increases, there is potential for them to be deployed in other areas of EU law as well.

The range, use and potential use of legislation that imposes over-the-border obligations is growing and EU legislators, regulators and arbiters of jurisdictional disputes need to equip themselves with a broad knowledge of this rapid cycle of change. This is important in order to ensure that the checks and balances built into EU law are up to the task of balancing the protection and projection of EU interests and values against the dangers of jurisdictional over-reach and the international tensions and blowback that follow.

The structure of the paper is as follows: section 2 sets out the traditional and novel triggers that have been included in EU legislation. Strange as it may seem, the description, let alone analysis, of these has attracted little attention in the academic literature and, in general, legislation is discussed only with reference to its own substantive area of concern.[8] This forecloses a broader analysis that compares the range of triggers deployed across different areas in EU law. The section concludes with examples of the global reach of the legislative instruments incorporating triggers of this kind. Section 3 explores the "safety valves" that are present in EU legislation incorporating novel "extraterritorial" triggers, including mechanisms that inject "contingency" and "contextuality" into the measures concerned. Section 4 takes the form of a brief case study of the controversial, much contested, and still evolving Financial Transaction Tax (FTT). By taking one piece of popular and populist legislation – often called the "Robin Hood" tax – it is possible to tease out and to expose some of the key considerations that go (and should go) into the design and appraisal of legislation incorporating novel "extraterritorial" triggers. Section 5 argues that the inclusion of adequate jurisdictional "safety

7. One possible exception to this in the area of maritime transport is Dir. 2005/35 on ship-source pollution and on the introduction of penalties, particularly criminal penalties, for infringements, O.J. 2005, L 255. This applies also to polluting discharges that occur on the high seas.

8. For a notable exception, from the point of view of theories of private international law, see Francq, "The scope of secondary Community law in the light of the methods of private international law – or the other way around?", 8 *Yearbook of Private International Law* (2006), 334.

valves" in EU legislation incorporating novel "extraterritorial" triggers can help to appraise the jurisdictional reasonableness of these measures and should form part of a legality assessment conducted by the ECJ. Section 6 concludes.

2. Triggers old and new in EU law

This section starts with an analysis of those tried and tested legislative triggers of conduct, presence and nationality, in turn founded on the well-established customary international law principles of territory and nationality. However, as we proceed it will become clear that the EU is moving into stranger and more novel waters, under the stimulus of the financial storms that emerged in the first decade of the 21st century. As a result, three new categories of trigger have emerged. While this development points to continuing innovation and experimentation on the part of the EU legislature, the diversity and fluidity of the types of triggers that the legislature relies on within each of the broad categories above strengthens that finding. An overview of the categories of triggers that the EU legislature relies on is set out below.

Table I: Triggers Old and New in EU Law

	Triggers		
Established	Conduct	Nationality	Presence
Novel	Effects	Anti-Evasion	Transacting with EU person or property

As a preliminary point, it is relevant to note that I do not discuss the so-called "close connection" test in the context of the triggers identified below. While this test has been relied on in the past by the EU to define the scope of application of EU consumer protection legislation, a different trigger now applies in relation to consumer contracts.[9] The close connection test is

9. Consumers may not waive rights granted by the EU's Consumer Rights Directive (Dir. 2011/83, O.J. 2011, L 304) where they are habitually resident in the EU and where the trader pursues his professional or commercial activities in that country or directs his activities to that country. See Art. 6(1) Reg. 593/2008 on the law applicable to contractual obligations (Rome I),

nonetheless still sometimes relied on by the ECJ in cases where EU legislation is not explicit in defining its own scope of application.[10]

2.1. *Triggers of old*

2.1.1. *Conduct*

It is self-evident that obligations frequently attach to persons who engage in conduct within the EU. The nature of the conduct required to trigger the application of EU law will vary according to the objectives that the legislation pursues. While the EU legislature relies on many different types of conduct to justify the imposition of obligations, perhaps the single most important head of jurisdiction in this category is market access or conduct that consists of a step in the direction of gaining access to the EU market: for example, the importation of a product, the marketing or placing on the market of goods or services, or the performance of a commercial act that is directed at EU consumers or investors such as sale, offer for sale or advertising. EU product standards will almost invariably apply to imported as well as domestically produced goods, and EU production process standards apply with increasing regularity to goods that are imported into the EU as well.[11]

Of course, the concept of market access is a constructed concept, and its parameters may occasionally be drawn in a way that leads to counter-intuitive results and which may lead to the non-application of EU law to conduct within the EU and to the application of EU law to conduct that takes place outside the EU. For example, some measures deem services provided within the territory of the EU to be regarded as not having been provided within the territory of the EU where they are provided at the exclusive initiative of the person receiving the service.[12] This is because these clients are regarded as professional investors and not requiring the protection that the measure confers. By

O.J. 2008, L 177/6. This trigger may be considered as falling under the heading of conduct (market access) set out in section 3.1 *infra*. For a highly informative discussion of this see Francq, op. cit. *supra* note 8.

10. See Case C-381/98, *Ingmar GB* v. *Eaton Leonard Technologies Inc.,* [2000] ECR I-9305. Anticipating somewhat the discussion below, the close connection test may also serve as a "territorially extending", trigger as is evident from Case C-214/94, *Boukhalfa* v. *Bundesrepublik Deutschland*, [1996] ECR I-2253. The ECJ (at para 15) endorsed a broad contextual standard, requiring the application of EU law to an employment relationship outside the EU when the employment relationship has a sufficiently close link with the EU, including a sufficiently close link with the law of an EU Member State.

11. For an unsuccessful attempt to impugn the legality of a measure regulating production processes that excluded imported products from within its scope, see Case T-13/99, *Pfizer Animal Health* v. *Council*, [2002] ECR II-3305, paras. 430–439.

12. See Market in Financial Instruments Regulation (MiFIR), Reg. 600/2014 on markets in financial instruments, Art. 36(4) and recital 36, O.J. 2004, L 173. This will not cover situations in which a third country firm solicits clients or potential clients in the EU or promotes or

contrast, the provision of services by a third country entity to the third country branch of an EU firm will sometimes be equated with market access even though the services are provided outside the territory of the EU.[13] This is intended to protect EU entities and, ultimately, EU financial markets against risk.

Access to the EU market may mean access to a general market or access to a sub-market that has been constructed by EU law. For example, the EU imposes obligations on credit rating agencies that provide ratings used for "regulatory purposes", in order to meet regulatory demands imposed by EU law.[14] Similarly, those supplying biofuels to the EU market will be obliged to comply with the sustainability criteria laid down in EU legislation insofar as these biofuels are to contribute to the attainment of a Member State's renewable energy target or are eligible to receive financial support.[15]

Whereas those taking steps to gain access to the EU's market will routinely incur obligations under EU law, those who export goods or services from the territory of the EU are often exempt.[16] For example, as a matter of law, the product safety requirements included in the EU's "new approach" directives do not apply to goods that are manufactured within the EU for export abroad.[17] There are, however, many pieces of EU legislation that do impose obligations on persons exporting goods or services from the EU. This is especially the case when the EU retains a security interest in the exported product or where political protests lead the EU to accept responsibility for goods or services exported abroad.[18]

advertises services or activities there. See similarly the definition of marketing in Art. 4(x) of Dir. 2011/61 (O.J. 2011, L 174) on alternative investment fund managers (AIFM Directive).

13. See e.g. Reg. 648/2012 on OTC derivatives, central counterparties and trade repositories (European market instruments regulation, "EMIR"), O.J. 2012, L 201, Art. 25(1).

14. Reg. 1060/2009 on credit rating agencies, O.J. 2009, L 302, Art. 1.

15. Dir. 2009/28 on the promotion of the use of energy from renewable sources, O.J. 2009, L 140, Art. 17.

16. For an attempt to impugn the legality of an EU measure because it included exported products within its scope see Case C-491/01, *R* v. *Secretary of State for Health ex parte British American Tobacco (Investments) and imperial Tobacco Ltd*, [2002] ECR I-11453.

17. See e.g. COM(2013)78 final, Product Safety and Market Surveillance Package, Proposal for a Regulation on consumer product safety, Art. 1. Arts. 2(2) and (3) are explicit in stating that this applies to products supplied for distribution, use or consumption on the EU market and to the first making available of a product on the EU market. However, EU legislation on consumer safety does accept that export bans may be put in place as a corollary to internal measures prohibiting, suspending or restricting the placing or making available within the EU of products that present a serious risk (See COM(2013)75 final, Product Safety and Market Surveillance Package, Proposal for a Regulation on Market Surveillance of Products), Art. 12(1).

18. This is an interesting, important and complex topic, but it cannot be discussed fully here. For an example of security-oriented export regulation, see Reg. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual- use items,

Despite this emphasis on market access, there is considerable variation in the kind of conduct that is relied on to trigger the application of EU law. Notably, the EU has been obliged to adapt its definition of what counts as EU conduct in order to keep up with developments in information and communication technologies.

We see this, controversially, in the area of data protection where the 1995 Data Protection Directive imposed obligations on data controllers who made use of equipment inside the EU for the purpose of processing personal data.[19] This novel head has been construed broadly to include the collection of data through the placing of cookies, or the use of JavaScript, ad banners or spyware, on personal computers situated within the EU.[20] However, over time it was felt that the EU had cast its net too wide; in essence imposing obligations and offering protection to persons with only a limited connection to the EU.[21] Consequently, under a new proposal, data controllers established outside the EU would only incur obligations where they process the personal data of persons who reside within the EU (EU data subjects).[22] The resulting contraction in the zone of protection constructed by EU law sits uneasily with the countervailing idea also expressed in this new proposal that the right to data protection should apply to all natural persons, independent of their place of residence or their nationality.[23]

The line separating conduct from other categories of jurisdictional trigger can sometimes be difficult to draw. This is evident in the area of criminal justice, where the physical presence within the EU of a perpetrator of a criminal offence may be one key element in determining whether the perpetrator's conduct should be viewed as having occurred within the territory

O.J. 2009, L 134. For an example of export regulation that is driven by political protests see Reg. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, O.J. 2005, L 200.

19. Dir. 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281, Art. 4(1)(c).

20. Art. 29 Working Party, "Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based websites" (WP, 56, 30 May 2002). For a critical discussion see Moerel, "The long arm of EU data protection law: Does the data protection Directive apply to processing of personal data of EU citizens by websites worldwide", 1 *International Data Privacy Laws* (2011), 28–46.

21. Art. 29 Working Party, "Opinion 08/10 on applicable law", 08/2010, p. 21.

22. COM(2012)11 final, Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 3(2) which would impose obligations on data controllers who are not established in the EU but only where they process the personal data of EU residents and where this processing relates either to the offering of goods or services to EU residents or to the monitoring of their behaviour.

23. Ibid., recital 2.

of the EU.[24] We will see many other examples of the blurring of the lines between jurisdictional categories in the examples set out below.

2.1.2. *Nationality*

EU law often imposes obligations on persons who enjoy the nationality of an EU Member State. This includes both natural persons and legal persons; including companies, aircraft,[25] fishing vessels[26] and ships.[27] While reference will be made here to EU nationality, it is important to emphasize that nationality is a derivative concept in the EU, based on the recognition of a person's status by an individual Member State.[28] A natural person who holds the nationality of a Member State is also accorded the status as an EU citizen as a matter of EU law.[29]

The Treaty on the Functioning of the European Union sets out what is in effect a nationality test for companies, for the purpose of delimiting the availability of the right of freedom of establishment in the EU's internal market.[30] This right is enjoyed only by a company that is formed in accordance with the law of an EU Member State and which has either its registered office, its central administration or its principal place of business within the EU.

Many pieces of EU legislation incorporate triggers that are implicitly nationality-based, imposing obligations on companies that have their registered office[31] or less often their head office (central administration) within an EU Member State.[32]

EU measures often use the concept of establishment as the trigger to justify the imposition of obligations on companies under EU law. While for companies the concept of establishment may sometimes be equated with

24. See e.g. Dir. 2013/40 on attacks against information systems, O.J. 2013, L 218, Art. 12(2).

25. This includes aircraft registered in an EU Member State.

26. This includes fishing vessels that fly the flag of an EU Member State and which are registered in the Community Fishing Fleet Register.

27. This includes ships that fly the flag of an EU Member State.

28. Though note that the EU regulates the conditions under which Member States may license air carriers, and thus confer nationality on them. Air carriers enjoy the nationality of the Member State which has issued a valid operating licence. See Reg. 2407/92 on licensing air carriers, O.J. 1992, L 240, esp. Arts. 2(b) and 4(1)(a).

29. See Art. 20(1) TFEU.

30. Art. 54 TFEU.

31. For just one example see the AIFM Directive, cited *supra* note 12, which defines an alternative investment fund manager as an EU AIFM if the manager's registered office is situated in an EU Member State.

32. The AIFM Directive (ibid) considers an Alternative Investment Fund (AIF) to be an EU AIF if it is authorized or registered in a Member State. If it is not authorized or registered, it will nonetheless be considered an EU AIF if it has either its registered office or its head office in an EU MS (Art. 2(k)).

nationality, this is by no means always the case. The concept of establishment is not always defined in EU legislation and where it is such definitions vary widely.[33] While some elements of a given definition may be relevant to an assessment of a company's nationality, such as the location of a company's registered office or head office, other elements may be viewed as pertaining only to presence of the company within the Member State concerned.[34]

Nationality is the one "old" trigger that makes no claim to territoriality,[35] and the exercise of extraterritorial prescriptive jurisdiction by a State over its own nationals is uncontroversial as a matter of customary international law. Nonetheless, the EU has stretched the boundaries of nationality jurisdiction by regulating the wholly foreign conduct of companies that are incorporated abroad, where these companies are subsidiaries of a parent company that holds the nationality of an EU Member State.

Controversially, the EU has exercised "subsidiary jurisdiction" of this kind in regulating the remuneration that may be paid to certain categories of staff employed by banks and investment firms.[36] The EU has famously introduced a bankers' "bonus cap" that fixes the variable element of remuneration at a maximum of 100 percent of salary or twice this level with explicit shareholder approval.[37] These provisions concerning remuneration operate at "group, parent company and subsidiary levels" including in relation to institutions that are established in offshore financial centres, outside the EU.[38] Consequently, they apply not only to staff employed within banks and investment firms within the EU (excluding the branches of third country firms), but also to staff employed in the third country branches and subsidiaries of EU-headquartered banks and investment firms.

The Commission is required to review the impact of compliance with the bankers' bonus rules in respect of its impact on any staff working effectively

33. See, AIFM Directive, ibid, Art. 4(j) (ibid.) which defines establishment by reference to a variety of different concepts depending on the type of undertaking involved.

34. For example, where the concept of establishment is deemed to include the establishment of a branch within the EU, this speaks to the presence of the company within the EU but not its nationality.

35. See Lowe and Staker, "Jurisdiction" in Evans (Ed.), *International Law.* 3rd ed. (OUP, 2010) at p. 323, who observe that jurisdiction based on "the national principle" has "a longer history than jurisdiction based on the territorial jurisdiction".

36. Dir. 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, O.J. 2013, L 176. The categories of staff affected are set out in Art. 92(2) and the criteria are to be further elaborated by the European Banking Authority pursuant to Art. 94(2). This has traditionally been the preserve of the United States and criticized by the EU. For a discussion see Thompson, "United States jurisdiction over foreign subsidiaries: Corporate and international law aspects", 15 *Law and Policy in International Business* (1983)*,* 319.

37. Dir. 2013/36, ibid., Art. 94(1)(g).

38. Ibid., Art. 92(1).

and physically in the third-country subsidiaries of EU parent companies, and to consider whether these restraints on variable remuneration should continue to apply to this category of staff.[39] The legality of the bankers' bonus cap has been challenged by the United Kingdom before the ECJ.[40] The United Kingdom has argued that "[t]o the extent that Article 94(1)(g) is required to be applied to employees of institutions outside the EEA, it infringes Article 3(5) TEU and the principle of territoriality found in customary international law".

2.1.3. *The presence of persons*

i) Stable presence: Legal concepts, such as residence in relation to natural persons and establishment (falling short of nationality) in relation to legal persons, also form the basis for the exercise of prescriptive jurisdiction in EU law. For example, any individual, partnership or legal entity that is resident or established in the EU will require a licence to provide brokering services from the EU, where that person has been informed that the items they are trading in are, or may be, intended for a weapon of mass destruction end use.[41] A natural person may be deemed to be resident within the EU as a matter of law even where that person is physically located abroad. Likewise, a corporation may be legally established within the EU, even when the corporation's officers are engaged in activities outside the EU.

As noted previously, the concept of establishment can run the gamut from nationality to stable presence. It may include the EU branches of companies whose registered office and/or head office are outside the EU.[42] It may even extend to entities that enjoy a stable presence in the EU despite not having opened even an EU branch. Establishment is understood in an extremely flexible way in the EU's original Data Protection Directive, which applies, *inter alia*, where "the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State".[43] Having regard to the Directive's preamble and seeking guidance in the freedom of establishment case law from the ECJ, the Article 29 Data

39. Ibid., Art.161(2)(b). It is required to do so by 30 June 2016 and, where appropriate, to submit a legislative proposal taking international developments into account.

40. Case C-507/13, *United Kingdom* v. *European Parliament & Council,* pending.

41. See Reg. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Arts. 4(1) and 5(1), cited *supra* note 18. For the definition of brokering services see Art. 2(5).

42. Occasionally, the EU will make access to the EU market conditional on the establishment of an EU branch. See Dir. 2014/65 (O.J. 2014, L 173) on markets in financial instruments (MiFID II), Art. 41 in respect of investment firms providing services to retail (non-professional) clients in the EU and Reg. 1060/2009 on credit rating agencies, O.J. 2009, L 302, cited *supra* note 14, Art. 4(1).

43. Dir. 95/46, cited *supra* note 19, Art. 4(1)(a) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Protection Working Party interpreted the concept of establishment as consisting of the "effective and real exercise of activity through stable arrangements" and desisted from emphasizing legal form.[44] Nonetheless, while an attorney's office or agent would constitute an establishment, the mere location of a server or computer in the territory of a Member State would not.[45]

The ECJ has also recognized the Data Protection Directive's "broad territorial scope" and the important role that this plays in ensuring that individuals are not deprived of the protection that they enjoy under the Directive. This stems not only from the flexible concept of establishment in the Directive, but also from the fact that it applies to data processing carried out "in the context of the activities" of that establishment rather than "in" that establishment. In the recent *Google Spain* case, the Court held that the processing of personal data will be deemed to be carried out in the context of the activities of an establishment of the data controller on the territory of a Member State where the third country operator of a search engine has set up a subsidiary within that Member State which is intended to promote and sell advertising space offered by that search engine and which orientates its activity towards the inhabitants of that Member State.[46] This remains the case even when the processing of personal data is carried out exclusively by the parent company which does not itself have a corporate presence within the EU, regardless it seems of where the data processing takes place. The ECJ considered the activities of the operator of the search engine (the U.S. company Google Inc.) and the activities of its Spanish subsidiary which sold advertising space on its behalf, to be "inextricably linked".[47]

EU law also imposes wide-ranging obligations on entities whose financial instruments are listed or admitted to trading on a regulated market situated or operating within an EU Member State.[48] In this situation, the entity that has

44. Art. 29 Working Party Opinion 08/10, cited *supra* note 21, p. 11. In Case C-390/90, *Lease Plan Luxembourg* v. *Belgium,* [1998] ECR I-2553, the ECJ did not accept that computer equipment constitutes a virtual establishment.

45. Ibid, Art. 29 Working Party, pp. 11–12.

46. Case C-131/12, *Google Spain Sl & Google Inc.* v. *Agencia Española de Protección de Datos (AEPD) & Mario Costeja González*, judgment of 13 May 2014, paras. 54 and 61.

47. Ibid., para. 55.

48. It is important to have careful regard to the precise wording of the instrument in question. E.g., the Commission's recent proposal to improve the gender balance among non-executive directors of companies listed on stock exchanges is intended to ensure that 40% of the non-executive directors of "publicly listed companies", excluding small and medium sized enterprises (SMEs), are women by 2020. As noted previously (*supra* note 3), the measure would not extend to all publicly listed companies within the EU, but only to companies that are both listed *and* incorporated in the EU.

listed the financial instrument may be considered to have a stable presence within the EU.

ii) Transient presence: The transient presence of persons within the EU serves increasingly often as a trigger for the application of EU law. We see this in relation to natural persons who may be required to obtain a visa before crossing the external borders of an EU Member State, even when the person in question enters EU territory for the purpose of transit and or for a short period of time.[49] We also see this in respect of EU regulation of international transportation and in the fisheries conservation domain. In both of these, the transient presence of third country aircraft, fishing vessels or ships will often suffice to incur obligations under EU law.

To give an example: aircraft that are registered in a third country are required by the EU to comply with international standards and EU standards (when there are no international standards) when they fly into, within or out of the EU.[50] Ships that are flagged in a third country incur obligations under EU law when they enter an EU port or offshore terminal, or anchor in waters under the jurisdiction of an EU Member State.[51] Likewise, third country fishing vessels may not access an EU port or port services, except in case of *force majeure* or distress, unless they meet the requirements laid down in the EU regulation on illegal, unreported and unregulated fishing (IUU fishing).[52] In shipping, the enhanced regulatory responsibilities of port States (as opposed to flag States) is said to have greatly improved the enforcement of standards that seek to reduce maritime pollution and improve ship safety.[53]

2.2. *Novel triggers*

In recent years, and particularly in the wake of the financial crisis, the EU legislature has started to rely on a number of novel triggers that serve to extend

49. See Reg. 539/2001 listing the third countries whose nationals must be in possession of a visa when crossing the external borders of an EU Member State and those whose nationals are exempt from that requirement, O.J. 2001, L 81.

50. Reg. 2111/2005, cited *supra* note 2 and Reg. 216/2008, Art. 9 on common rules in the field of civil aviation, O.J. 2005, L 344.

51. See e.g. Reg. 417/2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers, O.J. 2002, L 64 (repealed by Reg. 530/2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, O.J. 2012, L 172) and Reg. 782/2003 on the prohibition of organizing compounds on ships, both of which went further in their demands than the corresponding international standards applicable at the time, O.J. 2003, L 115.

52. Reg. 1005/2008 establishing a Community system to prevent, deter and eliminate IUU fishing, O.J. 2008, L 286, Art. 4(2).

53. Burrows, "Racing to the top… at last: The Regulation of safety in shipping" in Mattli and Woods (Eds.), *The Politics of Global Regulation* (Princeton University Press, 2011), pp. 189–210.

the global reach of EU law. The legislation that incorporates these triggers is geographically agnostic in the sense that it applies also to conduct taking place abroad.[54] While this legislation is unequivocally extraterritorial in its reach and gives rise to extraterritorial effects, it is far from clear whether the triggers themselves should be viewed as extraterritorial or not. The question of the territorial status of the triggers becomes all the more difficult as we move from the effects doctrine, which has recently been relied on explicitly by the EU legislature for the first time, to the other novel triggers set out below.

2.2.1. *Effects*

The European Commission has argued for some time that EU rules on competition should apply to third country undertakings when they engage in anti-competitive practices that have an appreciable impact or effect within the EU. Moreover, the General Court accepted that it would not be contrary to public international law for the EU's Merger Regulation to apply to mergers between foreign undertakings when it is foreseeable that the merger will have an immediate and substantial effect within the EU.[55]

Nonetheless, even in the area of merger control, for a merger to have a "Community dimension" something more than a finding of effects is required.[56] The Merger Regulation makes EU jurisdiction over a merger conditional on the undertakings in question exceeding both the worldwide and EU turnover thresholds that it lays down.[57] The EU turnover threshold will only be met when the undertakings sell the requisite level of goods or provides the requisite level of services within the EU.[58] The application of the EU Merger Regulation is thus only triggered by EU conduct even though when

54. Many measures resting on a conventional territorial trigger also apply to conduct that takes place abroad. This is the subject of my earlier piece on territorial extension in EU law, cited *supra* note 1. That paper does not discuss some important new developments covered in the present piece, such as the proposal for a Financial Transaction Tax addressed in sections 4–5 *infra*.

55. Case T-102/96, *Gencor* v. *Commission,* [1999] ECR II-753, para 90. In this judgment, the General Court seems to use the effects doctrine to circumscribe rather than to expand EU jurisdiction under the Merger Regulation. For a discussion see Whish and Bailey, *Competition Law,* 7th ed. (OUP, 2012), pp. 495–500. Note that the General Court was called the Court of First Instance until 2009.

56. This is regulated by the EU Merger Regulation, Reg. 139/2004 on the control of concentrations between undertakings, O.J. 2004, L 24, Art. 1(2–3).

57. Ibid.

58. Direct sales within the EU are also considered to be relevant by the Commission in demonstrating EU effects. Turnover is calculated in accordance with the rules laid down in Art. 5(4) of the Merger Regulation (cited *supra* note 56) and this involves the EU adopting a broad understanding of the boundaries of the undertakings concerned, combining the turnover of all affiliated entities.

this conduct does occur, the EU will appraise mergers between foreign undertakings that are concluded abroad.[59]

In competition law more generally, outside the area of merger control, the ECJ has favoured an "implementation" test which enables the EU to exercise jurisdiction when an anti-competitive agreement, decision or concerned practice has been implemented within the EU.[60] The ECJ has not yet clarified what position it would take where there is no clear evidence of EU implementation, but merely evidence of direct, substantial and foreseeable EU effects.

Although the jurisdictional status of effects has been discussed in the area of EU competition law for some time,[61] it is only recently that the EU legislature has started to rely on the effects doctrine as an explicit basis for the exercise of prescriptive jurisdiction. Most notably, the EU's Regulation on derivatives (European Market Instruments Regulation: EMIR) imposes clearing and risk-mitigation obligations on persons concluding certain types of derivatives contracts.[62] Contracts that are concluded exclusively between third country entities may be subject to these obligations where the contract in question has a direct, substantial and foreseeable effect within the EU. This is, to my knowledge, the first clear and express embodiment of the effects doctrine contained in EU legislation.

The approach adopted in EMIR is mirrored in the more recently enacted Markets in Financial Instruments Regulation (MiFIR) which imposes an obligation to trade certain classes of derivatives on a trading venue such a regulated market, a multilateral trading facility or an organized trading venue, rather than on an over-the-counter basis.[63] Again, this trading obligation will attach to third country entities where the contract in question has a direct, substantial and foreseeable effect within the EU.[64]

59. Wagner-von Papp, "Competition law and extraterritoriality" in Ezrachi (Ed.), *Research Handbook on International Competition Law* (Edward Elgar, 2012), pp. 21–59.

60. See especially Joined Cases 89, 104, 114, 116, 117 & 125–129/85, *Ahlström Osakeyhtiö and Others* v. *Commission* (Woodpulp I), [1988] ECR 5193, paras. 16–18. In this case, the Commission pushed for recognition of the effects doctrine whereas the Advocate General pushed for recognition of a qualified form of effects, requiring evidence of direct, substantial and foreseeable effects. The ECJ has also developed a "single economic entity" test that allows it to use the EU presence of one undertaking to establish jurisdiction over related firms abroad. See Case 48/69, *ICI* v. *Commission,* [1972] ECR 619.

61. For an early example of the Commission relying on the effects doctrine in the area of competition law see Decision 69/243/CEE adopted on 24 July 1969.

62. Reg. 648/2012, cited *supra* note 13, Art. 4(1)(a)(v) in relation to the clearing obligation and Art. 11(12) in relation to risk mitigation techniques.

63. MiFIR, cited *supra* note 12, Art. 24(1).

64. Ibid., Art. 24(2).

The EU also relies on the effects doctrine in its Market Abuse Regulation (MAR).[65] This applies *inter alia* to transactions, orders to trade, and other behaviour relating to financial instruments, including derivative products, whose price or value has an effect on the price or value of a financial instrument that is traded on a relevant market within the EU.[66] The provisions of this Regulation concerning market manipulation also apply to spot commodity contracts (other than wholesale energy products) where a transaction, order or behaviour has or is likely or intended to have an effect on the price or value of a financial instrument that is traded within the EU.[67] These provisions similarly apply to financial instruments which are not traded on an EU market where a transaction, order or behaviour has or is likely to have an effect on the price or value of a spot commodity contract and where the price or value of this spot commodity contract depends on the price or value of the financial instrument in question.[68] This remains the case regardless of whether the spot commodity contract in question pertains to commodities for delivery outside the EU. In this situation, the effects of the behaviour regulated by the EU would be diffuse, as this behaviour would impact upon the stability of global commodity markets and commodity prices worldwide, and not only within the EU.

The new Market Abuse Regulation stands out even by comparison with the EU's Derivatives Regulation (EMIR). In EMIR, the breadth of the effects doctrine is circumscribed by the requirement that effects must be "direct, substantial and foreseeable". In the Market Abuse Regulation, the qualifiers are less pronounced. While the effects in question must be at least "likely" or "intended", there is no need for the EU to demonstrate that they must be either significant or direct. Indeed, where effects within the EU are mediated via the impact of behaviour on global commodity markets, these effects may be thought to be indirect. The absence of an intensity of effects threshold in this Regulation is rendered somewhat less important as a result of the definition of insider information laid down. For information to be capable of constituting inside information, it must be capable of having a significant effect on the price of financial instruments.[69] While no similar proviso exists as far as the

65. Reg. 596/2014 on market abuse (market abuse regulation or MAR), O.J. 2014, L 173. See also Art. 28(1)(b) of Reg. 236/2012 (O.J. 2012, L 86) on short selling and certain aspects of credit default swaps which allows ESMA to intervene in exceptional circumstances in respect of behaviour relating to financial instruments that poses a threat to the functioning and integrity of financial markets in the EU or to the stability of the whole or part of the financial system in the EU.

66. Ibid., MAR, Art. 1(1)(d).

67. Ibid., MAR, Art. 1(2) (a).

68. Ibid., MAR, Art. 2(2)(b).

69. See the definition in ibid., MAR, Art. 7.

definition of market manipulation is concerned, even here the preamble stresses the capacity of market manipulation to have a "*significant* impact on the prices of financial instruments in a relatively short period of time"[70] In the light of this, it seems probable that a requirement that effects be significant (though not necessarily direct) would be read into this instrument by the European Court.

2.2.2. *Anti-evasion*

Recourse to the effects doctrine in the EU's Derivatives Regulation (EMIR) is accompanied by a novel trigger that is intended to catch artificial behaviour designed to evade obligations laid down in EU law. This has the effect of requiring third country entities to comply with the measure's clearing and risk mitigation obligations where this is necessary or appropriate to prevent the evasion of any provision of this Regulation.[71]

As with the inclusion of the effects doctrine in EMIR, this anti-evasion trigger was included late in the legislative process at the behest of the European Parliament.[72] Recourse to both the effects doctrine and to the anti-evasion trigger was stated, rather vaguely, to be intended to foster financial stability within the EU.[73] As we will see below, the Commission is empowered to adopt delegated legislation clarifying which kinds of contract will be caught by a trigger of this kind.

Also, as noted previously, the Markets in Financial Instruments Regulation (MiFIR) imposes a trading obligation on certain classes of derivatives contracts, and specifies the type of markets these contracts may be traded on.[74] This obligation will bite *inter alia* where this is necessary or appropriate to prevent the evasion of any provision of this Regulation.[75]

In addition, in this setting, the European Securities and Market Authority (ESMA) is charged with regularly monitoring activities in derivatives which have not been declared subject to the trading obligation as described in Article 24(1) MiFIR in order to identify cases where a particular class of contracts may pose a systemic risk and to prevent regulatory arbitrage between derivative transactions subject to the trading obligation and derivative transactions which are not subject to the trading obligation.[76] The recognition

70. Ibid., MAR, recital 47 (emphasis added).

71. Reg. 648/2012, cited *supra* note 13, Art. 4(1)(a)(v) in relation to the clearing obligation and Art. 11(12) in relation to risk mitigation techniques.

72. See Position of European Parliament adopted at first reading on 29 March 2012 (EP-PE_TC1-COD(2010)0250).

73. Reg. 648/2012, cited *supra* note 13, recital 23.

74. MiFIR, cited *supra* note 12, Art. 24(1).

75. Ibid., Art. 24(2).

76. Ibid.

in this setting of the importance of continuously monitoring activities in order to be in a position to take steps to mitigate the threat of regulatory arbitrage is of potentially great importance. We will see in relation to the proposed financial transaction tax below, that the challenge of ensuring that effective regulation does not come at the cost of reduced competitiveness and the global relocation of economic enterprise may to some extent be addressed by having recourse to novel "extraterritorial" triggers that serve to bring foreign corporations and their foreign activities within the scope of application of EU law.

2.2.3. *Transacting with an EU person or property*

A person may incur obligations under EU law not as a result of their own status but as a result of the status of the person or property with whom or with which they transact. In this situation, the person incurring an obligation under EU will have an indirect connection with the EU as a result of the relationship that they have formed with a person or property that has been deemed to be sufficiently closely connected with the EU.

i) The counterparty principle. As was observed above, the EU's Derivatives Regulation (EMIR) imposes obligations on parties concluding OTC derivatives contracts. A clearing obligation will attach to third country entities when they enter into a relevant contract with an EU (financial) counterparty.[77] Here, the third country counterparty is viewed as enjoying an indirect connection with the EU, by virtue of its decision to enter into a transaction with a counterparty that is authorized or established within the EU. This indirect connection is treated as sufficient to justify the imposition of obligations under EU law.

There are many pieces of legislation that make the fact that a person enters into a transaction with, or engages in other behaviour in relation to, a person who holds the nationality of an EU Member State or who resides within its territory, relevant in determining whether the legislation applies.[78] However, it is almost invariably the case that for a non-EU person to incur obligations as

77. Reg. 648/2012, cited *supra* note 13, Art. 4(1)(a)(iv). Recall the definition of financial counterparty and non-financial counterparty in Art. 2(7) and (8). Counterparties falling within these definitions may be considered to be EU counterparties. For another recent example see Dir. 2014/59, cited *infra* note 80, concerning bank/financial insolvency proceedings. Art. 69(3) allows resolution authorities to suspend payment or delivery obligations under a contract entered into by an institution under resolution, including the payment and delivery obligations of that institution's counterparties.

78. In fact, one of the examples included in section 2.1.1 *supra* concerning EU conduct could also have been classified as resting on a trigger falling into the category of "transacting with an EU-connected person". See Reg. 648/2012, Art. 25, cited *supra* note 13, which imposes obligations on third country CCPs which provide services to EU-established customers, including where those customers are third country branches of EU firms.

a result, they must themselves also engage in some element of EU conduct. We see this in the consumer protection example referred to above.[79] For the rights conferred by the Consumer Rights Directive to be treated as imperative rights, not only must the consumer reside habitually within the EU but the trader must also pursue his professional or commercial activities in the consumer's country of habitual residence or direct his activities to that Member State. The EU's Derivatives Regulation (EMIR) is consequently distinctive, in that the mere fact of entering into a transaction with an EU-connected person is sufficient to spark the application of EU law.

We see the counterparty principle in action also in the EU's new Bank Resolution Directive (BRD).[80] Here, foreign counterparties do not incur obligations under the Directive as such, but they can be deprived of rights that they would otherwise enjoy in their contractual relations with "wobbly" EU investment firms or banks.[81] For example, foreign counterparties may be temporarily suspended from terminating contracts with banks "under resolution" or they may find themselves subject to a "bail-in" whereby they are required to endure a write-down of some of the debt owed to them by the financial institution in question.[82]

ii) The property principle. Reliance on the property principle as a jurisdictional trigger occurs when the EU exercises jurisdiction over transactions on the basis that the property involved in those transactions has a close and specified link with the EU. Where the EU relies on the property principle, the identity of the parties engaging in a transaction is not jurisdictionally salient and nor is the location in which the transaction takes place. In each of the examples set out below, the property that forms the basis for the exercise of jurisdiction by the EU takes the form of financial instruments including, for example, sovereign debt or shares.

In 2012, the EU enacted a Short Selling Regulation.[83] This imposes notification and disclosure requirements on entities which hold net short positions in shares and imposes restrictions on uncovered short sales.[84] It does so in relation to shares that are admitted to trading on a trading venue in the EU, even where the shares in question are traded outside this or any other

79. Recall *supra* note 9.

80. Dir. 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms, O.J. 2014, L 173.

81. I borrow the term "wobbly" from Peter Werner, Senior Director at ISDA, who used this term during his presentation at the British Institute for International and Comparative Law on 10 July 2014.

82. Ibid., Arts. 71, 63(1)(e) and note the important caveat in Art. 67(2) regarding assets located in third countries and transactions that are governed by foreign law.

83. Reg. 236/2012,cited *supra* note 65.

84. Ibid., Arts. 5, 6 & 12.

trading venue.[85] It does not matter who is trading in the shares in question or where the transaction takes place. It is the connection that is forged between the shares and the EU – at the point when the shares are admitted to trading on an EU trading venue – that triggers the application of EU law. This is subject to an exemption that applies when the principal venue for the trading of the shares in question is located in a third country rather than the EU.[86]

The Short Selling Regulation also imposes notification obligations on persons who hold net short positions in sovereign debt and restrictions on uncovered sales in sovereign debt and on uncovered sovereign credit default swaps.[87] Sovereign debt is defined as a debt instrument issued by a sovereign issuer, such as the EU, a Member State or an international financial institution established by two or more Member States for the purpose of mobilizing funding and providing financial assistance to the benefits of Member States that are experiencing or threatened by severe financing problems.[88]

The EU's Market Abuse Regulation is also relevant to understanding the role that property may play as a basis for the exercise of prescriptive jurisdiction in EU law. [89] This measure prohibits insider trading and market manipulation, and imposes additional obligations on a range of actors including issuers of financial instruments, market operators and persons who professionally arrange transactions in financial instruments. The Regulation applies to financial instruments that are admitted to trading on a regulated market in at least one Member State, or for which a request for admission has been made, as well as financial instruments that are traded on a multilateral trading facility or an organized trading facility in at least one EU Member State.[90] It also extends to financial instruments whose price or value depends on or has an effect on the price or value of a financial instrument traded on an EU market.[91] Significantly, from a territorial point of view, this Regulation applies to all these EU-connected instruments (property), even when they are being traded outside an EU trading venue, including in relation to transactions that take place abroad.[92]

85. A trading venue is a regulated market or a multilateral trading facility.

86. Reg. 236/2012, cited *supra* note 65, Art. 16. A list of such shares will be published by ESMA every two years.

87. Ibid., Arts. 7,13 and 14.

88. Ibid., Art. 2(1)(f) and Art. 2(1)(d).

89. Reg. 596/2014, MAR, cited *supra* note 65. This was preceded by Dir. 2003/6 on insider dealing and market manipulation (market abuse), O.J. 2003, L 96.

90. Ibid., Art. 2(1)(a-c).

91. Ibid., Art. 2(1)(d).

92. Ibid., Art. 2(1)(c).

2.3. *The global reach of EU law*

The previous section of this paper has exposed the rich variety of triggers that the EU relies on to provide the jurisdictional foundation to support the application of its laws. It not only highlighted the emergence of new heads of jurisdiction within existing categories, but the emergence of novel categories as well. In the wake of the global financial crisis, the EU has had recourse to triggers that were previously unknown in EU legislation, including effects, anti-evasion, the counterparty principle and the property principle.

The most striking feature of legislation that relies on novel "extraterritorial" triggers of this kind is the fact that it regulates conduct that takes place entirely abroad.[93] Moreover, it does so even when the person engaging in the foreign conduct in question is neither a national of an EU Member State nor physically or legally present within the EU. Consequently, recourse to these novel triggers serves to expand the global reach of EU law, bringing within its scope behaviour that would previously have been regulated exclusively by other States, for example by the State within whose territory the conduct in question occurred. Table II below summarizes the global reach of EU legislation of this kind.

Table II: The Global Reach of EU Law

Instrument	**Trigger**	**EU Obligation**	**Foreign Conduct**
EU Derivatives Regulation (EMIR)	Effects; anti-evasion; counterparty principle	Clearing and risk mitigation techniques	OTC derivatives contracts concluded abroad
Market in Financial Instruments Regulation (MiFIR II)	Effects; anti-evasion.	Trading obligation	OTC derivatives contracts concluded abroad

93. It bears repeating that some measures that rest on territorial triggers also regulate conduct that takes place outside the EU. This is illustrated by both the *ATAA* and the *Google Spain* cases, cited *supra* notes 6 and 46.

Instrument	Trigger	EU Obligation	Foreign Conduct
Short Selling Regulation	Transactions involving EU property	Transparency requirements and restrictions	Persons outside EU holding significant net short positions and entering into uncovered short sales
Market Abuse Directive and Regulation (MAD and MAR)	Transactions involving EU property; effects	Prohibition on market manipulation	Behaviour constituting market manipulation that takes place abroad
Bank Resolution Directive (BRD)	Counterparty principle	No termination of contracts with banks under resolution and possibility of "bail-in" of foreign counterparties	Transactions concluded abroad by foreign counterparties

3. "Safety valves" and jurisdictional self-restraint

It is clear from the overview presented above that the EU has increasing recourse to novel triggers that serve to extend the global reach of EU law and which enable it to govern conduct that takes place entirely abroad. EU legislation of this kind is liable to occupy regulatory spaces that are occupied also by other States. Where the EU regulates foreign conduct, it will often be the case that this conduct is also regulated by the State in which it occurs. As a result, recourse to novel "extraterritorial" triggers increases the prevalence of overlapping claims to authority by different States and of individuals being subject to multiple and sometimes conflicting laws.

The rationale for EU reliance on "extraterritorial" triggers of this kind is quite clear. These measures seek to protect EU persons and public authorities from financial risks, to protect the stability and integrity of EU financial markets or to prevent the sovereign authority of the EU from being undermined as a result of steps taken by individuals to evade the application of its laws. Also, in the case of the proposed Market Abuse Regulation, the EU is concerned to promote the integrity of global commodity markets, in view of the fact that these global markets also set commodity prices within the EU. Thus, recourse to these novel triggers in the financial services sphere reflects the truly global nature of financial markets and the vulnerability of EU governments, investors and consumers in the face of high risk or systemically risky behaviour that takes place elsewhere.

While the rationale for the adoption of measures that incorporate "extraterritorial" triggers may be clear, the jurisdictional basis for such measures is not. These measures are neither self-evidently territorial or extraterritorial and it is far from clear whether these triggers can be viewed as consistent with the territorial principle that is recognized by customary international law.

It is significant in the light of this to observe that the EU measures that incorporate "extraterritorial" triggers also frequently incorporate jurisdictional "safety valves" that are intended to prevent jurisdictional over-reach and to facilitate cooperation and to reduce conflict between States. This section examines the two most significant jurisdictional safety valves that the EU has put in place.[94] These are sometimes deployed individually in EU legislation and sometimes combined.

These two mechanisms – labelled "contingency" and "contextuality" here – imply a degree of jurisdictional restraint on the part of the EU and can be viewed as an expression of the proportionality principle in legal instruments that create over-the-border obligations. These mechanisms also create opportunities for continuing dialogue between the EU and third country regulators and entities, setting in train a discursive process rather than an emphatic, one-sided and uncompromising "extraterritorial" application of EU rules.

3.1. *Contingency*

The concept of contingency is intended to capture the tentative or provisional nature of the EU's claim to regulatory authority. Contingency implies that

94. Note also the inclusion of an additional safety valve in relation to the bankers' bonus cap. The Commission is required to review the impact of compliance with the bankers' bonus rules in respect of its impact on "any staff working effectively and physically" in the third country subsidiaries of EU parent companies and to consider whether these restraints on variable remuneration should continue to apply to this category of staff. It is required to do so by 30 June 2016 and, where appropriate, to submit a legislative proposal taking international developments into account (see Art. 161(2)(b), Dir. 2013/36, cited *supra* note 36). See also Arts. 45(5) and 67(2) of the BRD (*supra* note 80) for a strong expression of EU reticence in relation to third country assets or transactions governed by foreign law.

while the EU is increasingly willing to insist upon the application of its legislation to conduct that takes place abroad, it is also willing to consider "disapplying" this legislation when the foreign conduct in question has been satisfactorily regulated by another State or by an international body.

The EU's Derivatives Regulation (EMIR) offers a textbook example of contingency of this kind.[95] Here, the Commission is empowered to adopt decisions declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to those laid down in EMIR and that these third country arrangements are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country. Where at least one counterparty to a derivatives contract is established in a third country that benefits from an equivalence decision of this kind, all of the counterparties to the contract will be deemed to have fulfilled the specified obligations under EU law.[96] Consequently in this setting, equivalence leads to the "disapplication" of EU law not only in relation to third country entities but in relation to the EU entities with which they transact as well. Also, notably, the disapplication of EU law does not depend upon there being evidence of the existence of a genuine conflict between EU and third country law.[97]

Contingency as equivalence is of significance in both procedural and in substantive terms. Procedurally, while it is ultimately for the EU to make an equivalence determination before disapplying its own laws,[98] it is nonetheless clear that equivalence creates opportunities for intensive dialogue and for the exchange of information and views between EU and third country

95. Regulation 648/2012, cited *supra* note 13, See especially Art. 13(2) laying down a "mechanism to avoid duplicative or conflicting rules", including in relation to the clearing and risk mitigation obligations in Art. 4(1) and Art. 11. More unusual is the Short Selling Regulation Reg. 236/2012, cited *supra* note 65, which provides for the disapplication of EU law where the principal trading venue for the shares in question is in a third country, regardless of whether that third country has equivalent laws in place.

96. Ibid., Reg. 648/2012, cited *supra* note 13, Art. 13(3).

97. This is because in this setting contingency is indeed to prevent duplicative as well as conflicting requirements. This stands in contrast to Art. 37 of the AIFM Directive (cited *supra* note 12) concerning the authorization of non-EU alternative investment fund managers which lays down what may be labelled a conflict equivalence clause. This permits the disapplication of EU law in favour of equivalent third country law only where it is impossible to combine compliance with EU and third country law.

98. The relevant legislative instrument will lay down the procedure to be followed. In EMIR, an equivalence determination is adopted by the Commission by way of the examination procedure set out in Art. 86(2) Reg. 648/2012, cited *supra* note 13. The Commission has mandated ESMA to provide it with technical advice before making a determination of this kind. See by way of recent example, ESMA, *Final report*, *Technical advice on third country regulatory equivalence under EMIR – US* (1 Sept. 2013, ESMA/2013/1157).

regulators.[99] Equivalence determinations may be unilateral acts but they are nonetheless adopted within a framework of close and continuous collaboration between the EU and the third countries concerned.[100]

Substantively, the EU claims to follow an "objective-based approach", which emphasizes functional equivalence rather than the existence of identical rules.[101] It is about comparability in terms of the capacity of third country measures to achieve the EU's objectives rather than the precise content of a third country's rules. There are signs that the EU is willing to be flexible in the conduct of its equivalence assessments. To give just one recent example, in assessing the equivalence of U.S. measures under EMIR, ESMA demonstrated a willingness to take into account not only legally binding measures adopted by the US, but also the "internal policies, procedures, rules, models and methodologies" put in place by private actors, where these internal policies cannot be changed without the approval of the regulatory authorities and when a failure to implement these internal policies can give rise to enforcement action by the State.[102]

3.2. *Contextuality*

It is often the case that when the EU relies on novel "extraterritorial" triggers, these triggers take the form of contextual standards rather than rules. Contextual standards render the application of EU law conditional on a case-by-case, contextual, assessment of whether the criteria established by an open-ended standard have been met in a specific set of circumstances, rather than on the application of a more clearly delimited but more rigid rule. This is the case with the "effects" and "anti-evasion" triggers that were highlighted above. There are two manifestations of contextuality inherent in the Market in Financial Instruments Regulation (MiFIR). First, this includes both effects and anti-evasion as free-standing contextual triggers. Second, it imposes an obligation on ESMA to monitor derivatives transactions that are not subject to the trading obligation in order to identify additional cases that may pose a systemic risk and to prevent regulatory arbitrage.[103]

99. Note, for example, ESMA's remarks in the Final Report, ibid, para 4 (p. 6).

100. In the context of EU recognition of U.S. equivalence under EMIR, EU Commissioner Barnier is reported to have said "our discussions have been long and sometimes difficult, but they have always been close, continuous and collaborative talks between partners and friends". See CFTC Press Release PR-6640 of July 11, 2013, 'The European Commission and the CFTC reach a Common Path Forward on Derivatives' at: <www.cftc.gov/PressRoom/PressReleases/pr6640-13> (last visited 18 July 2014).

101. For one example see Final Report, cited *supra* note 98, para 4.

102. Final Report, cited *supra* note 98, paras. 78–80 concerning central counterparties.

103. MiFIR (Reg. 600/2014), cited *supra* note 12.

While contextual standards of this kind may create uncertainty about the circumstances in which EU law will apply, including in relation to wholly foreign conduct, they place a burden on the EU to bring forth the contextual evidence necessary to demonstrate that the criteria embodied in the contextual standard have been met. Contextual standards thus place a continuing duty of reasoned justification on the EU in a bid to ensure that the application of EU law is really necessary in view of the objectives pursued by the legislation in question. Seen in this way, contextual standards may be viewed as giving effect to the proportionality principle, in that they impose an obligation on the EU to justify the application of EU law on a case-by-case basis and serve to guard against the danger of an over-inclusive rule.

That said, in view of the risk contextual standards may pose to legal certainty, they are often embedded within a governance framework that provides for their further elaboration. We see this most clearly in the EU Derivatives Regulation (EMIR). This imposes an obligation on ESMA to draft regulatory technical standards specifying which kinds of derivatives contracts may be considered to have a direct, substantial and foreseeable effect within the EU and the cases in which it may be necessary or appropriate to prevent the evasion of any provision of the Regulation.[104] These regulatory technical standards may be adopted by the Commission as a Delegated Regulation in accordance with the procedure laid down.[105]

The adoption of Delegated Regulations of this kind may blur the line between contextual standards (such as effects) and rules (such as stable presence within the EU). Again, this is apparent from the example of EMIR where the contextual standard in the form of "effects" has in essence been translated into two distinct rules. Contracts will be deemed to have a direct, substantial and foreseeable effect within the EU where at least one third country entity benefits from an appropriate guarantee provided by a financial counterparty established in the EU (a counterparty principle of sorts) or where two third country entities enter into a contract through their branches in the EU (stable presence within the EU).[106] This stands in contrast to ESMA's elaboration of the "anti-evasion" trigger, where it adopts a "criteria based" rather than a "prescriptive list" approach. A contract shall be deemed to fall within the anti-evasion trigger when it has as its primary purpose the

104. Reg. 648/2012, *supra* note 13, Arts. 4(4) and 11(14)(e).

105. Ibid. The procedure is laid down in Arts. 10–14 of Reg. 1095/2010 establishing a European Supervisory Authority (European Securities and Market Authority), O.J. 2010, L 331.

106. Art. 2 Commission Delegated Regulation 285/2014 (O.J. 2014, L 85) supplementing Regulation (EU) No. 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effects of contracts within the Union and to prevent the evasion of rules and obligations, O.J. 2012, L 201.

avoidance of the application of any provision of the Regulation; namely where its primary purpose is to defeat the object, spirit and purpose of the Regulation, including when it is part of an artificial arrangement that intrinsically lacks business rationale, commercial substance or relevant economic justification.[107] Thus, in the case of this second novel "extraterritorial" trigger, its contextual nature remains pronounced even following the adoption of delegated legislation elaborating upon its scope.

It nonetheless remains the case that even in the wake of the adoption of delegated regulations the scope of application of legislation embodying contextual standards remains fluid because it may always be refined or altered in the future by the adoption of further delegated legislation. The adoption of delegated regulations merely creates provisional agreement about a measure's scope of application, but the contours of that agreement may shift in the light of experience in the application of the measure concerned.[108]

From the point of view of enhancing cooperation and avoiding conflict with other States, it is significant to note that where contextual standards are embedded within a governance framework providing for their elaboration, this framework will provide opportunities for regulators and potentially affected entities in third countries to seek to influence the nature of the provisional agreement about how the contextual standards in question should be construed. As with equivalence, the process of refining the contours of contextual standards encourages a dialogue between "insiders" and "outsiders". This is clearly apparent in relation to EMIR. Here, ESMA publicly consulted on the possible content of its draft regulatory technical standards on two occasions, over a period of more than eighteen months.[109] When it published its Final Report setting out its draft regulatory technical standards, ESMA included information concerning the feedback received from stakeholders and detailed the changes to its draft standards that this feedback had induced.[110] ESMA's draft regulatory technical standards were

107. ESMA, Final Report, "Draft technical standards under EMIR on contracts with a direct, foreseeable and substantial effect within the Union and anti-evasion", paras. 48 & 49 (15 Sept. 2013, ESMA/2013/1657) and Art. 3 of the Commission Delegated Regulation, ibid.

108. In this setting, it would be appropriate for the ECJ to impose an obligation to conduct a regular review of the scope of the contextual standard in question. For an example of the Court imposing an obligation of this kind in a different setting see Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others*, [2008] ECR I-9895, para 62.

109. Final Report, cited *supra* note 107, para 5.

110. Ibid., pp. 6–13. For one example, see para. 25 concerning the removal of the term "legally enforceable" from the text of the standards.

broadly welcomed within the sector and were viewed as narrowing the "extraterritorial" impact of EMIR outside the EU.[111]

Thus far, this paper has discussed the design and application of legislative triggers that enhance the global reach of EU legislation and the safety valves that are built into this legislation by the principles of contingency and contextuality. We now turn to the case of the proposed Financial Transaction Tax to look at the triggers and safety valves this controversial Commission proposal incorporates.

4. Extraterritoriality and the Financial Transaction Tax (FTT)

Of all the EU measures – actual and proposed – that rest on novel "extraterritorial" triggers, the most controversial is the Commission's proposal for a Financial Transaction Tax (FTT).[112] As proposed, this would impose a levy of 0.1 per cent on stock and bond trades and 0.01 percent on derivatives transactions. In its current guise, and pursuant to the Treaty's enhanced cooperation procedure,[113] the FTT would apply in eleven Member States (the participating Member States or the EU-11).[114]

According to the counterparty principle, a financial institution will be deemed to be established within a participating Member State and hence liable to pay the FTT, when it is party, or acting in the name of a party, to a financial transaction with an EU-11 institution or with an institution that has a stable presence within the EU-11.[115] In this scenario, a financial institution is deemed to be established within the EU-11 because of the connection that it has formed with an institution that has a direct nationality-based or territorial connection with a participating Member State.

The counterparty principle is complemented by the "issuance principle",[116] which is represented by the Commission as being a trigger of last resort.[117] This is a property principle in terms of the scheme presented above. According

111. For just one example see PWC, "FS regulatory briefing: EMIR proposals narrow impact outside EU" (Aug., 2013).

112. COM(2013)71 final proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax. For an earlier proposal see COM(2011)594 final.

113. See Art. 329(1) TFEU and Council Decision 2013/52 authorizing enhanced cooperation in the area of financial transaction tax.

114. These are Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.

115. COM(2013)71 final, cited *supra*, note 112, Art. 4(1)f). Art. 4(1)(a-e) define what I mean here by an EU institution or an institution with a stable EU presence.

116. Ibid., Art. 4(1)(g).

117. Ibid., p. 11.

to this principle, a financial institution or a non-financial institution will be deemed to be established within the EU-11 when it is party to a transaction, or acting in the name of a party to a transaction, involving a structured product or financial instrument that has been issued within the EU-11. For example, a party entering into a transaction involving Volkswagen shares would be taxed regardless of whether that party is an EU national or is legally or physically present within the EU; and regardless of where in the world the transaction takes place. The concept of issuance is not defined in the proposal, but the impact assessment accompanying this clarifies that the place of issuance is the place in which the issuer of the structured product or financial instrument resides.[118] The issuance principle was included for the first time in the 2013 proposal, and it is intended to "improve the resilience of the system against relocation",[119] making it "less advantageous" for entities to relocate activities or establishments outside the territory of participating Member States.[120]

The counterparty principle and the issuance principle have proved to be controversial in the context of the FTT. Both London and Washington have declared their intent to fight the tax to ensure it does not over-reach the eurozone and tax or double-tax legitimate activity outside its borders.[121] In addition, the United Kingdom challenged the legality of the Council's Decision to authorize enhanced cooperation arguing, *inter alia*, that the Decision authorized the adoption of an FTT with extraterritorial effects and that this was contrary to customary international law.[122] As has been widely reported, the ECJ dismissed the UK's challenge as premature, concluding that the principles of taxation challenged by the UK did not form part of the Council's preliminary decision to authorize enhanced cooperation.[123]

Nonetheless, read against the background provided in section 1.2 above, it is clear that neither the counterparty principle nor the issuance principle is unprecedented as a matter of EU law. The counterparty principle is also included in the EU's Derivatives Regulation (EMIR), and recourse to a property principle finds expression in existing legal instruments that impose obligations on persons who enter into transactions involving financial instruments that are listed within the EU. While the FTT is distinctive in its emphasis upon the place of issuance of a financial instrument rather than upon its place of listing, even here it overlaps with the Short Selling Regulation to a

118. SWD(2013)28 final, Impact Assessment accompanying the proposal for a directive implementing enhanced cooperation in the area of financial transaction tax, p. 40.

119. Ibid., p. 5.

120. Ibid.

121. Barket and Politi, "Brussels Proposes €30bn "Tobin Tax", *Financial Times* (14 Feb. 2013).

122. Case C-209/13, *United Kingdom* v. *Council*, judgment of 30 Apr. 2014, nyr.

123. Ibid, para 36.

certain extent.[124] As was noted above, the Short Selling Regulation imposes obligations on persons who enter into a transaction involving sovereign debt issued by a Member State of the EU.

In the light of this, the triggers relied on by the Commission in its FTT proposal are of a kind that fall within the categories of novel "extraterritorial" triggers identified above. While the FTT triggers are distinctive in a number of subtle ways, they do not seem sufficiently different to explain the intensity of the opposition that this proposal has generated both at home and abroad. Nonetheless, the FTT proposal is different from other EU measures incorporating novel "extraterritorial" triggers. This is due less to the nature of the triggers themselves, and more to the absence or inadequacy of the safety valves that this proposal includes. While EU measures incorporating novel "extraterritorial" triggers tend to be characterized by a high degree of "contingency", often through the inclusion of an equivalence clause, the FTT proposal is not. On the contrary, the proposal does not contemplate the "disapplication" of EU-11 law in favour of the law of a non-participating Member State or a third country where one counterparty, or indeed the transaction as whole, has been made subject to a comparable or comparably effective financial transaction tax elsewhere.[125] The absence of a safety valve in the form of an equivalence clause raises a suspicion that the Commission regards the FTT's revenue-raising objective as paramount, as this is the only one of the proposal's stated objectives that could not, in principle, be achieved as a result of equivalent action by other States.

Also, while the FTT proposal has recourse to a contextual standard of the kind highlighted in section 3, it does so in an entirely novel way. The Commission's proposal contains an "escape clause" which is contextual in nature. Article 4(3) of the Commission's proposal provides that: "Notwithstanding paragraphs 1 and 2, a financial institution or a person who is not a financial institution shall not be deemed to be established within the meaning of those paragraphs, where the person liable for payment of the FTT proves there is no link between the economic substance of the transaction and the territory of the participating Member State." Thus, liability to pay the tax will be excluded when the conditions laid down in Article 4(3) are met. As with the other contextual standards that the EU has relied on to delimit the scope of its prescriptive jurisdiction (such as effects or anti-evasion), the standard contained in Article 4(3) is open-ended and its application will require careful assessment of the full set of circumstances surrounding the transaction at hand. However, in contrast to the other examples set out above,

124. Regulation 236/2012 on short selling, cited *supra* note 65.

125. Steps are taken to exclude the possibility of double-taxation within the FTT zone but not in relation to (financial) institutions from a non-participating Member State.

the contextual standard embedded in Article 4(3) places the burden of demonstrating that the criteria have been met not on the EU but on the individual who, *prima facie*, is subject to EU law.

Furthermore, and by contrast with the EU's Derivatives Regulation (EMIR), the Commission proposal does not establish a governance framework to facilitate further clarification and exemplification of the circumstances in which the open-ended criteria laid down by the contextual standard will be deemed to be met. It is for Member States, acting on a case-by-case basis, to adjudicate on the claims arising under Article 4(3). Member States are not even under an obligation to report to the Commission about how they have exercised their discretion in this respect; either in relation to the procedures that they have followed or in relation to the circumstances in which the conditions laid down in Article 4(3) have been deemed to be met.

We will return to consider the legal salience of absent or inadequate safety valves in the discussion of jurisdictional reasonableness in section 5 below.

5. Assessing the reasonableness of legislation incorporating novel "extraterritorial" triggers

It is highly likely that the ECJ will in due course find it necessary to rule on the legality of EU legislation incorporating novel "extraterritorial" jurisdiction and to do so in the light of customary international law.[126] When this happens, the ECJ will be confronted with a difficult task. While the bases of jurisdiction recognized by customary international law are clearly established and relatively stable, the boundaries and contours of these jurisdictional categories are not. The categories of jurisdiction recognized by customary international law are set out in the table below.[127]

126. The ECJ did not assess the legality of the ship-source pollution directive (Dir. 2005/35, cited *supra* note 7) from the point of view of customary international law in Case C-308/06, *R.* v. *International Association of Independent Tanker Owners (Intertanko) & Others* c. *Secretary of State for Transport,* [2008] ECR I-4057.

127. For a good overview of customary international law in this area, including its ambiguities in the light of international practice, see: International Bar Association, Report of the taskforce on extraterritorial jurisdiction (IBA, 2009) and Lowe and Staker, op. cit. *supra* note 35.

Table III: Customary International Law Bases for the Exercise of Prescriptive Jurisdiction

Jurisdictional Base	**Scope**
Territorial Principle	Jurisdiction over conduct within territory, persons present within territory (and conduct generating effects within territory?)
Nationality/personality	Active: Jurisdiction over nationals (and residents?) Passive: Jurisdiction over conduct that harms nationals (and residents?)
Protective Principle	Jurisdiction over conduct that threatens a State's vital interests
Universal Principle	Jurisdiction over heinous crimes that does not depend upon the existence of a nexus with the State

We can illustrate the ambiguous boundaries of these jurisdictional bases by reference to the territorial principle and in the light of the novel "extraterritorial" triggers identified above:

Effects: While there is increasing acceptance that "the effects doctrine" constitutes a form of territorial jurisdiction, its status and meaning remains contested both as a matter of politics and law.[128] The Commission has recently argued that the effects doctrine confers jurisdiction "over events that affect" a State's territory,[129] but it has not been consistent on this point. In an amicus curiae brief submitted to the U.S. Supreme Court in the *Kiobel* case, the Commission argued that effects-based jurisdiction remains controversial as a matter of international law, although it did acknowledge that the territorial principle has been expanded in some States to include extraterritorial conduct that has or is intended to have substantial effects.[130] As noted previously, while the General Court has accepted that it may be lawful for the EU to rely on the effects doctrine, where it is foreseeable that foreign conduct will have

128. Ibid., pp. 12–13.

129. Non-Paper by the Commission Services, "Response to the Opinion of the Legal Service of the Council on the Legality of the Counterparty-Based Deemed Establishment of Financial Institutions" (undated) at: <www.openeurope.org.uk/Content/Documents/Pdfs/FTTECLegalOpinion.pdf>., para 7.

130. *Amicus Curiae* Brief by the European Commission on Behalf of the European Union in Support of Neither Part in *Kiobel et al.* v. *Royal Dutch Petroleum et al.*, fn. 28.

an immediate and substantial effect within the EU,[131] the Court of Justice has yet to rule definitively on this point.

Anti-evasion: The relevance of territory to the functioning of the anti-evasion trigger remains conspicuously unclear. This novel "extraterritorial" trigger aims to ensure that a person does not construct artificial arrangements that intrinsically lack a business rationale in order to sever a jurisdictionally salient connection with the EU for the primary purpose of avoiding obligations imposed by EU law. This is intended to prevent regulatory arbitrage where this results from artificial arrangements of this kind. It is far from straightforward in doctrinal terms to determine whether an exercise of prescriptive jurisdiction over persons who seek to evade obligations in this way should be viewed as constituting an exercise of territorial jurisdiction or not.

It would certainly be open to the ECJ to argue that where artificial arrangements are used to evade a territorial trigger incorporated within EU legislation, this should be viewed as an exercise of territorial jurisdiction. Similarly, where artificial arrangements are used to evade a nationality trigger, this should be viewed as an exercise of nationality jurisdiction. Equally, however, it would be entirely plausible for the ECJ to consider that the anti-evasion trigger is a free-standing trigger and that the premise that underpins it (the existence of artificial arrangements which result in a person evading obligations under EU law), is not territorial as such.

The Counterparty and Property Principles: Both the counterparty and property principles result in the imposition of obligations on persons because of the connection they have formed with a person or property with a strong link to the EU. Consequently, obligations attach to persons who enjoy only an indirect connection with the EU. This indirect connection may be based on nationality (where the counterparty is an EU national) or on territory (where the counterparty is present within the EU or where the property has a territorial connection with the EU). Even where the indirect connection is territorial, it is far from clear whether an indirect connection of this kind should be viewed as falling within the boundaries of the territorial principle or not.

Given the ambiguous boundaries of the jurisdictional bases recognized by customary international law, including in particular the territorial principle, the question of whether a measure falls within these bases will very often be a question of judgement rather than a question of brute fact. While there are heads of jurisdiction other than the territorial principle that could conceivably be called in aid in a bid to justify EU recourse to novel "extraterritorial"

131. Recall the judgment of the General Court in *Gencor*, cited *supra* note 55 and the discussion of related cases in *supra* note 60.

triggers, it is important to bear in mind that the status of the passive personality principle is contested as a matter of international law and that the protective and universal principles have tended to be extremely restrictively defined.[132] Consequently, in any legal appraisal of EU recourse to novel "extraterritorial" triggers, the territorial principle will assume centre-stage.[133]

Various suggestions have been put forward to assist States and others in appraising measures that may be thought to constitute an exercise of extraterritorial jurisdiction. Prominent among these is the American Law Institute's 3rd Restatement of U.S. Foreign Relations Law which sets out "limitations on jurisdiction to prescribe".[134] Although there is considerable merit in the "rule of reason" upon which the American Law Institute relies, it nonetheless adopts an approach to the exercise of prescriptive jurisdiction which is simultaneously too narrow and too broad.

It is too narrow, on the one hand, because it suggests that a State should refrain from exercising jurisdiction where this would give rise to a norm conflict between two States and where another State clearly has a greater interest in regulating the person or conduct at hand. In circumstances of jurisdictional overlap and conflict, a balancing of State interests approach is advocated with the result that the "winner takes all". Here, a State may be required to refrain from regulating even when this regulation is required to protect important national or global interests, and regardless of the merits of the regulation adopted by other States. On the other hand, the American Law Institute's guidance may be considered too broad because it lays down criteria for evaluating the "reasonableness" of the exercise of prescriptive jurisdiction which focus virtually exclusively on the question of whether it is reasonable for a State to act – as opposed to the question of whether it is reasonable for a State to act in the manner it has, having regard to the design features of the measure at hand.[135]

By contrast with this approach, experience on the ground in the EU is suggestive of a different conception of jurisdictional reasonableness. This is premised both upon an acceptance of the inevitability of concurrent or

132. Lowe and Staker, op. cit. *supra* note 35.

133. It would be possible to seek to justify the anti-evasion trigger on the basis of the protective principle in that it seeks to prevent the legislative authority of the EU from being undermined; and, at greater stretch, the counterparty trigger on the basis of the contested passive personality principle in that it seeks to prevent harm to EU nationals and/or residents.

134. Restatement of the Law (Third) of the Foreign Relations Law of the United States, para 403. For an excellent overview and critical analysis, and for many relevant references, see Ryngaert, *Jurisdiction in International Law,* (OUP, 2008).

135. It can be argued that sub-sections d) and h) of para 403(1) of the Restatement (ibid.) are concerned with the mode of regulating. Sub-section d) requires States to evaluate the existence of justified expectations that might be protected or hurt by the regulation; sub-section g) requires States to evaluate the likelihood of conflict with regulation by another State.

overlapping jurisdiction (and I would argue a rejection of a balancing of State interests approach);[136] and upon a recognition of the importance of designing legislative instruments with a view to eliminating unnecessary overlaps. From this perspective, the inclusion of jurisdictional "safety valves" can play a crucial role. Safety valves that serve to inject contingency and contextuality into EU legislation incorporating novel "extraterritorial" triggers can be viewed as contributing to jurisdictional reasonableness in circumstances in which EU and third country assertions of jurisdiction have a strong potential to overlap.

Like interest balancing, a conception of jurisdictional reasonableness that attaches considerable weight to the existence and adequacy of safety valves would comprise a relational component. This would imply that the EU has an obligation to take into account equivalent or adequate legislation that has been put in place by other States, and to "disapply" EU law where an entity has been subject to equivalent or adequate legislation elsewhere. As experience shows, an assessment of the equivalence or adequacy of third country legislation necessitates intensive contacts between EU and third country authorities. The resulting dialogue has the potential to prevent unnecessary duplication in the application of laws and to facilitate regulatory learning, build trust and reduce conflict between States.

A safety valve-focused conception of reasonableness would also serve to imbue EU legislation with a dynamic quality. The inclusion of contextual standards, whether as a trigger or as an "escape clause", would serve to ensure that the global reach of a given piece of legislation is subject to ongoing adjustment as new factual scenarios emerge and as the regulator's understanding of what kinds of foreign conduct threaten the attainment of the EU's objectives improves. This is in keeping with the emphasis that the ECJ has itself placed on the importance of maintaining the dynamic quality of contextual standards and its finding in a different setting that it is unlawful for

136. This suggestion has much in common with Ryngaert's arguments (op. cit. *supra* note 134) who also argues in favour of concurrent jurisdiction, albeit that his analysis still rests to a greater extent on a balancing of State interests approach. Ryngaert considers that where the State that enjoys the strongest nexus with a situation fails to act, other States should be allowed to step in to take up this regulatory slack, at least insofar as the protection of global interests is at stake. I do not think it is desirable or realistic to try to balance State interests in this way or to refuse to countenance the possibility of a State exercising jurisdiction to protect its own interests as opposed to the global interest. Hence, the emphasis that I am inclined to place on questions of legislative design.

a Member State to transform a contextual standard included in legislation into a hard and fast rule.[137]

As an aside, where a contextual standard takes the form of a devolved "escape clause", as in the Commission's proposal for a financial transaction tax, it is critical that Member States be required to report to the Commission on the manner in which this escape clause has been interpreted and applied. This would enable the Commission to concretize and refine the contours of the escape clause and perhaps even to adjust the definition of underlying triggers where experience with the application of the escape clause suggests that these are framed in a manner that is systematically too wide.

It is the argument of this paper that the inclusion of jurisdictional safety valves in EU legislation incorporating novel "extraterritorial" triggers should be required as a matter of EU law; subject perhaps to the legislature providing a robust explanation as to why the inclusion of safety valves of this kind would threaten the attainment of the legislation's objectives.

It is salient to note in the light of this that, in its legal opinion regarding the proposed financial transaction tax, the Council did attach legal significance to the absence and inadequacy of safety valves of precisely this kind. It criticized the proposal on the basis that it made no provision for double-taxation relief for (financial) institutions that are established outside the EU-11.[138] As such, it does not contain a mechanism to inject contingency into the measure concerned. The Council Legal Service also criticized the design of the "escape clause" included in the proposal, arguing that its lack of clarity and the high level of autonomy that it granted to Member States could be anticipated to generate disparity in the application of the Directive and to create a real risk of litigation and legal insecurity.[139] Indeed, while the Council Legal Service talks the talk of an "interest balancing" approach in its legal opinion, it never gets to the stage of actually balancing the EU interests against the interests of third countries, because it condemns the proposal on a range of different grounds, including the absence and inadequacy of the jurisdictional safety valves laid down.

137. Case C-70/00, *Commission* v. *Spain* [2004] ECR I-7999, para 33, where the ECJ stated that a contextual trigger in the form of a "close connection" test could be implemented by Member States through recourse to presumptions, but that it could not be circumscribed by predetermined criteria.

138. Non-Paper by the Commission Services, cited *supra* note 129, para 30; albeit that the Council's criticisms on this point were framed in the language of discrimination between EU-11 and non-EU-11 entities.

139. Ibid., para 25.

6. Conclusion

This paper has focused on the choice of triggers in EU legislation, exemplifying the diversity and dynamic nature of EU legislative practice in this respect. We have seen the emergence of new heads of jurisdiction and the emergence of novel categories of jurisdiction as well. An awareness of this rich variety helps to guard against the danger that the deeply political act of selecting or designing a legislative trigger remains shrouded in a veil of almost technocratic inevitability. Even where no allegations of "extraterritoriality" arise, the EU's choice of trigger bears deeply on the distribution of the burden of complying with EU law and on how easy this burden is to evade. It also impacts significantly upon how great a contribution a measure may make to the attainment of its stated objectives as well as upon the distribution of the benefits that flow from EU law.

As the examples referred to in section 2.1. show, controversy can arise even in relation to triggers that fall within conventional jurisdictional categories (conduct, nationality and presence). This is particularly the case where the trigger implies a fleeting or attenuated connection with the EU,[140] or where measure in question gives rise to territorial extension because a territorial trigger is used to gain leverage over conduct occurring abroad.[141]

The focus of this paper has been on novel "extraterritorial" triggers included in EU legislation. These serve to expand the global reach of EU law and can result in non-EU persons incurring obligations under EU law in relation to activities that take place entirely abroad. EU measures that incorporate these triggers – which include for example effects, anti-evasion, the counterparty principle or the property principle – are situated within a contested transition zone between the territorial and the extraterritorial, and consequently their compatibility with the territorial principle recognized by customary international law is a question of judgement and debate.

This paper has also laid emphasis on the fact that EU legislation that incorporates novel "extraterritorial" triggers frequently includes jurisdictional safety valves that are intended to prevent jurisdictional over-reach and to increase cooperation and avoid conflict with other States. The application of EU legislation is frequently rendered "contingent" because the EU exhibits a willingness to step back when foreign conduct has been regulated adequately by other States. The application of EU legislation is

140. See e.g. Joined Cases C-446/09 & C-495/09, *Koninklijke Philips Electronics NV* v. *Lucheng Meijing Industrial Co. Ltd et al and Nokia Corporation* v. *HM Commissioners of Revenue and Customs*, [2011] ECR I-12435, concerning the seizure of goods in transit within the EU on the basis that they were suspected of infringing intellectual property rights protected in the EU.

141. See e.g. *ATAA*, cited *supra* note 6 and *Google Spain*, cited *supra* note 46.

sometimes "contextual" in that certain of the novel "extraterritorial" triggers relied on by the EU take the form of contextual standards rather than hard and fast rules. This would include the anti-evasion trigger and effects. These contextual standards place a continuing duty of reasoned justification on the EU which is required to demonstrate why the specific foreign conduct meets the context-sensitive standard laid down.

This paper has argued that the inclusion of safety valves of this kind may be necessary to ensure the reasonableness, and ultimately the legality, of EU measures that incorporate novel "extraterritorial" triggers. Consistent with this, the reasonableness of these measures should not be appraised exclusively by reference to the triggers that they incorporate or by assessing the balance of interests between the EU and third States. On the contrary, those charged with entering the tricky terrain between territorial and extraterritorial legislation should have regard to the design features of the legislation in question and, in particular, the adequacy of the safety valves that it puts in place. Viewed from this perspective, the Commission's current proposal for a financial transaction tax is flawed.