

PROJECT PROPOSAL: EXTERNAL EFFECTS OF EU LAW

1. Introduction

The idea of the project is to bring together a group of participants whose research focuses on the external effects of EU law from different perspectives. Through the European integration project the Union has developed into a powerful entity capable of influencing its environment beyond EU territorial borders. Coupled with its status as an economic heavyweight, the European Union can utilize its substantial powers in areas such as internal market law, competition and its foreign policy to alter the conduct of states, international actors and individuals. These powers may generate effects both in third country legal orders as well as in international law. This research project focuses on the processes with which the EU governs or affects activities that are not centered upon the territory of the EU¹ and why it may choose to do so. The collaboration between RENFORCE and CLEER allows us to draw from an extensive and diverse group of academics and researchers and makes it possible to explore the processes described above from a wide array of different perspectives and (legal) disciplines.

The aim of the project is to make an inventory of the different forms and fields in which external effects of EU law occur, the ways these effects may come about, the goals they may serve for the Union and its Member States, and the policy implications for the EU and external actors. The EU may influence conduct, policy and law beyond its territorial borders with a broader variety of methods and processes than only its foreign policy tools. Several concepts have been developed in various academic fields to analyze these mechanisms. A first example is that internal measures may be designed to alter the conduct of individuals outside the territory of the European Union, a method known as '*territorial extension*'.² Secondly, the Union is capable of forcing adaptations in its external sphere through market dominance, internal regulatory propensity and the ability to regulate the EU consumer market, a process that is also called '*the Brussels effect*'.³ The Brussels effect may either be generated through an explicit strategy of the EU or it may be an unforeseen externality of measures intended to have internal effects. The effect occurs due to the reliance of substantial amounts of foreign producers on access to the EU consumer markets. Thirdly, actors may want to adapt their laws to the EU due to their own policy preferences and sometimes seek the support of the EU to do so.⁴ This includes examples of '*voluntary transfer*', cases in which third country actors adapt their laws and policies to the EU standard to improve upon their internal status quo. While voluntary transfer is sometimes an unintentional side-effect of the internal EU regulatory process, there are also cases in which the EU is actively involved in promoting emulation by third states.⁵ The EU has for instance utilized diplomatic persuasion and technical and financial support to promote its standards. Instances where the initiative for EU regulatory export lies with third states also include examples of '*indirect coercive transfer*', cases in which the necessity to adapt to the EU model is caused by the environment of the third country actor, such as technological advances or international pressures.⁶ Finally, foreign policies such as the European Neighborhood Policy, accession policy, development, trade and European visa policies provide opportunities in the bi- and

¹ J. Scott, Extraterritoriality and Territorial Extension in EU Law, *American Journal of Comparative Law*, volume 62, issue 1 2014, pp.87-162

² Ibid.

³ A. Bradford, The Brussels Effect, *Northwestern University Law Review*, volume 107, issue 1 2012, pp.1-68

⁴ D.J.B. Svantesson, The Extraterritoriality of EU Data Privacy Law – Its Theoretical Justification and Its Practical Effect on US Businesses, *Stanford Journal of International Law*, volume 50, issue 53, 2014 pp.52-102; A. Jetschke, P. Murray, Diffusing Regional Integration: The EU and Southeast Asia, *West European Politics*, volume 35 issue 1 2012, pp. 174-191

⁵ See for instance T. Lenz, Spurred Emulation: The EU and Regional Integration in Mercosur and SADC, *West European Politics*, volume 35, issue 1 2011, pp.155-173

⁶ Voluntary transfer and indirect coercive transfer are two methods by which policy transfer occurs. For a review of this concept, see: D. Dolowitz, D. March, Who Learns What from Whom: a Review of the Policy Transfer Literature, *Political Studies*, volume 44, issue 2 1996, pp.343-357

multilateral spectrum to provide external effects to EU law. Thus, the EU possesses an array of tools and mechanisms to, deliberately or unintentionally, affect its external regulatory environment and to enforce its external policies.

3. Purpose and structure of the project

The RENFORCE programmes' main research questions seek to assess how the '*optimal mix of shared regulation and enforcement of European policy [can] be developed, both from the perspective of effectuation and from the perspective of core values*', *inter alia* '*keeping in mind the interaction between the European and national dimensions and the external influences on these*'.⁷ The project 'External effects of EU Law' is a building bloc within the broader Renforce programme. Its external focus provides a new angle into addressing Renforce's central research question of the optimal mix of regulation and enforcement and therefore complements the other, mainly internally oriented RENFORCE research projects. Furthermore, three of CLEER's main research themes relate to examining the reception of international law in the EU's legal order, the projection of EU law on the international plane, and issues of coherence and consistency in EU external policy-making and implementation. Focusing the main features of the RENFORCE research question and the CLEER research themes into a narrower set of project questions has yielded:⁸

1. *Which (combinations of) processes exist by which the EU exports and/or externally enforces its values, policy and law with regard to third states?*
2. *Which effects do these processes generate for third states, foreign private actors and international actors and to which extent do these processes contribute to the goals of the EU?*

In answering this question, the project will firstly perform research into the values the EU seeks to export, such as environmental protection, privacy and consumer protection.⁹ The tension that the export of these values may create in terms of the sovereignty of individual third states, as well as the frictions that may result from the European legal order asserting its autonomy in international law will also be investigated.¹⁰ Secondly, the project will contribute to our understanding how the EU can directly or indirectly regulate its external environment and to what extent the (combinations of) different processes by which EU norms are exported are effective. Thirdly, through a study of the external jurisdiction options and EU conditionality, we will gain insight into the external policy enforcement capabilities of the EU. Finally, determining the processes which are currently occurring or available to the Union with regard to both regulation and enforcement will contribute to an understanding of the current coherence and consistency in EU foreign policy and our understanding of the optimal mix of EU external relations policy

⁷ The main research questions read as follows: How can the optimal mix of shared regulation and enforcement of European policy be developed, both from the perspective of effectuation and from the perspective of core values? What are the guiding principles, essential prerequisites and components here, keeping in mind the interaction between the European and national dimensions and the external influences on these?

⁸ The two research questions also correspond with three of the four RENFORCE themes. The first question relates to the policy cycle theme and is concerned with the processes and mechanisms that achieve external effects of EU law. It also refers to the core values theme, as it relates the processes that achieve external effects EU law to the export and enforcement of normative values underlying the EU legal order. The second question similarly includes the policy cycle and the core values themes, but also contributes to the multi-layered legal order theme by adding an element on the EU's influence on the international level and the goals this influence may achieve on the European level.

⁹ See on the global role of Europe as a normative power I. Manners, Normative power Europe: a contradiction in terms?, *Journal of Common Market Studies*, volume 40, issue 2 2002, pp.235-258

¹⁰ See for instance Opinion 1/09 of the ECJ in which it rejected the establishment of a unified patent litigation system because it would deprive the ECJ of its powers to give preliminary rulings. See also Opinion 2/13 in which the ECJ declared the EU accession to the ECHR not compatible with art. 6(2) TEU.

resources.¹¹ With these areas of inquiry, the project aims to generate results relevant for both academia and policy-makers. In the academic sphere, one of the project's main contributions lies within the insights it aims to grant into the processes by which EU law gets exported, which can be subsequently be applied to research into other policy areas or future export processes. Research into the external policies of third states may also draw on the results of this project to investigate whether the results also hold for these jurisdictions. For policy-makers, the insights into the frictions of EU law's external effects, the ways such frictions can be avoided, how the EU can achieve an optimal policy mix and the insight in the unintentional external side-effects of internal EU law will be particularly interesting.

4. Some examples

A first example of external effects of EU law can be found by looking at the effect of the Court of Justice's (CJEU) judgments on the decision making of the UN Security Council. The Security Council imposes targeted sanctions upon certain individuals it believes are associated with terrorist organizations. For these sanction measures to become operational they need to be implemented by states. Individuals adversely affected by these measures may challenge such implementation before the respective domestic courts. Since the EU thought it necessary to implement the Security Council's measures as well, individuals may also challenge the lawfulness of EU's implementation before the CJEU. This court now has decided in several cases that the implementation of the measures does not meet the requirements of human rights law as protected within the EU legal order. As a consequence, the Court continuously annuls EU's implementation of the sanctions. Therewith the efficacy of the Security Council measures is undermined. In response the Security Council amended the sanction regime's procedures to meet the human rights standard as demanded by the CJEU. Presently, however, the Court still is not satisfied with the latest amendments, and the dialogue between the Security Council and the Court continues. This interaction results in a higher level of protection of human rights for all individuals around the world targeted by this particular sanctions regime.

Another example concerns the blacklisting of foreign carriers not complying with EU civil aviation standards pursuant to Regulation 2111/2005 EC.¹² Through the blacklisting of carriers which fail to meet these requirements, the EU forces aviation companies wishing to operate on EU territory to adopt a higher standard than their home-country legislation might require. Considering it can be inefficient for a carrier to maintain separate standards for aircraft operating in the EU and the non-EU markets (not to mention the risk of being banned from the EU-market due to a part of the fleet being deficient according to EU standards), the Regulation may have the effect of exporting European civil aviation safety norms to third countries. Furthermore, the Annex to the Regulation, setting out the criteria for consideration of an operating ban, notes that the lack of ability/or willingness of the civil aviation authorities of third states to address deficiencies may be a reason for a blacklisting of a company. As such, the Regulation may also indirectly prompt third countries to strengthen their civil aviation authorities, meaning the potential effects of Regulation 2111/2005 EC may go beyond voluntary compliance with EU standards to stimulate foreign authorities to update their public regulation.

¹¹ In addition to the contribution of the project to the main RENFORCE research question, several of the RENFORCE themes can be recognized in the projects' output. Research into the values that are exported or are the reason for EU external policy will provide a contribution to the Core Values theme. Furthermore, determining the optimal mix of regulation and enforcement options available to the Union will contribute to the Policy Cycle theme. Finally, the effects of EU law and policy on international law will mean that a contribution to the multi-level legal order theme will be made by the project.

¹² Regulation No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC

In addition to examples concerning the EU's effect on regulation beyond its borders, several examples exist with regard to the extra-territorial enforcement of EU standards. Some mechanisms of extra-territorial enforcement focus work through the judiciary. In these cases the EU courts are capable of, for example, sanctioning foreign companies for non-compliance with EU law. A well-known form of extra-territorial enforcement through the judicial route may be found in EU competition law, with courts having jurisdiction to sanction infringements of Articles 101 and 102 TFEU by foreign companies, on the condition that the collusion or dominant market position have an actual or potential influence on the trade between EU Member States.¹³ Considerations as the companies' place of registration or its real base of activities are thus of no consequence to the jurisdiction of the EU courts when applying EU competition law.

A more politicized form of enforcement may be found in the area of Union accession policy. Countries with a 'European perspective', such as Kosovo, are annually given a set of goals relating to for example the adoption of the EU *acquis*, a sound protection of the rule of law and the promotion of fundamental rights. When these goals are achieved, the country may be deemed ready to further integrate with the Union through trade and association agreements, in a gradual process ultimately leading to accession. This gradual process is monitored by the Commission, which may enforce the adoption of EU standards by considering that the third country should implement further measures in order to receive the incentives promised by the Union.¹⁴ The ability of the Commission to monitor and enforce compliance with accession goals provides a method for the Union to transfer its regulation to those countries that can be offered the prospect of membership.

These are only some of the areas in which external effects of EU law can be found, and other potential research areas could include sectors such as civil aviation, product safety, health law, financial markets regulation, trade, privacy and data protection, migration and international company law.

5. Project plan

The coming months will be used to investigate what other examples of external effects of EU law there are, and which researchers would be able to contribute to the project. The aim is to provide a diversity of perspectives, which will be tied together by the theme of external effects of EU law. We will approach researchers and experts based on their expertise and availability. In particular we will identify potential participants from academia and/or research institutes through the RENFORCE program and the CLEER network. A kick-off seminar/conference will be held in the period April-June 2015, in which leading experts will exchange their views on the external effects of EU law with the project participants. Furthermore, the study of the external effects of EU law seems highly adequate for interdisciplinary cross-overs. Internally, the present criminology expertise may be used to add an interdisciplinary dimension to the project. External expertise in relevant areas such as the political sciences, international relations or economics could be integrated into the projects' output by contacting researchers outside RENFORCE/CLEER.

¹³ Y. Botteman, A. Patsa, the Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits, *European Competition Journal*, volume 8, issue 2 2012, pp. 365-382

¹⁴ See for example the European Partnership Action Plan 2012, http://www.mei-ks.net/repository/docs/European_Partnership_Action_Plan_2012.pdf

Contributions and Output

Draft contributions are expected to be available towards the end of 2015 and will be published in a decentralized manner. This means that we will not compose an edited volume or special issue of a journal, but rather that each particular angle to the central topic is published in its own type of journal. The advantage of this approach is that the different contributions will be published in a wide array of relevant journals, since individual researchers are free to submit their papers to peer-reviewed journals within their field. In this way the research project will be able to reach out beyond the usual suspects and will secure a much wider publicity for RENFORCE and CLEER. Content-wise, output may consist of sector-specific case studies, studies holistically considering the effects of EU law on a given territory or a given set of territories, studies considering the process in which external effects are generated and the role of the EU in fostering norms beyond its territorial boundaries, or studies into the definition and conceptualization of different forms of external effects.

Coherence and visibility

To ensure the project's coherency and visibility each contribution will draw from the same conceptual framework. The framework will form the starting point for the exploration of the external dimensions in the particular field, and it will tie these separate components to the broader conceptual structure of the RENFORCE/CLEER project. This will also provide visibility to the participants. In addition, a horizontal study/paper will be written as the conclusion of the project, in which the findings and conclusions of the various contributions that compose the project will be analyzed and tied together. This horizontal study will be published in an open access source (for instance SSRN, via the RENFORCE and/or CLEER websites, an open access peer reviewed journal or in a working paper format). The conceptual framework utilized for the publication of the individual contributions will benefit the comparability of project findings during the writing of the horizontal study. An annex will be included with an overview of the articles and hyperlinks to their original sources. In addition, to further the integrity and coherency of the project, we will also organize regular meetings on the progress of individual contributions and a final conference at which (some) of the results will be publicly discussed. Moreover, the RENFORCE and CLEER website can provide a platform for the participating researchers. The participants and the topics of their contributions to the project will be made visible via the RENFORCE and possibly the CLEER website and through newsletters. Furthermore, links between the CLEER and RENFORCE websites will offer added visibility for both research groups.

Incentives for (external) researchers

The project setup has a number of advantages for participating researchers. As mentioned, the decentralized publication process will offer researchers a large amount of freedom and enable them to incorporate their project contributions into their existing research activities while ensuring coherent project output. Meanwhile, participants are offered an interesting platform through the combined network and capabilities of CLEER and RENFORCE. This will aid in the dissemination of research output as well as the hosting of several interesting events during the course of the project. External visibility for researchers is guaranteed through a listing on the RENFORCE and/or CLEER project website. Furthermore, the overarching and open access end-publication in which the insights of the other contributions are analyzed will take the content of individual contributions beyond the sum of their parts. The references to individual contributions contained in the end-publication will moreover add to the visibility of the entire projects' output.