

# 1 INTRODUCTION

*During my research on the territorial scope of EU law, I researched where EU law begins and where it ends. Where it begins is easier to determine than where it ends.<sup>1</sup>*

## 1.1 REASON AND PURPOSE OF THIS RESEARCH

We often say that borders seem to have faded in our globalised world, and we have various factors as proof: the increasing liberalisation of trade in goods and services; money transfers; the digitised economy; the growing number of multinational businesses; more cross-border movement of persons – especially with the advent of low-cost air travel, holding the ‘right’ passports,<sup>2</sup> and the lower thresholds needed to cross borders. In reality, borders have not completely disappeared. They have ‘slumbered’, at best, and are slowly waking up and becoming an insurmountable hurdle for many. During the pandemic, for example, travel restrictions (the Schengen area’s internal borders made an appearance again)<sup>3</sup> were unyielding and led the EU to seal some of its external borders (even using tangible borders – fences<sup>4</sup> – in some cases) to regulate or even stop migration. And with the reality of Brexit, the control of persons and goods was reinforced on both sides of the

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1 Metaphor derived from a short conversation I had with Jacques Steenbergen about my research. See on the definition of EU law, Section 1.4.1. From an institutional point of view, we concluded that EU law starts in the Brussels-Strasbourg-Luxembourg triangle, the cities where the EU legislature (Council and European Parliament (EP)) is established, respectively where the Court of Justice of the EU is established. At one point in time, basing all EU institutions in Saarland and bringing Saarland under EU control as ‘Europe’s District of Columbia’ was an idea that was contemplated; B. Long, *No Easy Occupation – French Control of the German Saar 1944-1957*, New York: Camden House, 2015, p. 187.

2 Provided the person holds the ‘right’ passport. With the ‘wrong’ passport, travelling around the world is less evident; see on the differentiation in rights connected to passports: D.V. Kochenov, ‘Ending the Passport Apartheid. The Alternative to Citizenship is No Citizenship – A reply’, *International Journal of Constitutional Law* 2020/4, p. 1525.

3 The reintroduction of border controls at the internal borders between Member States happened, for example, owing to an increase in migration of third-country nationals to the EU, on account of which six Member States reintroduced control at their borders with other Member States (for example, Austria at its borders with Hungary and Slovenia; ECJ, 26 April 2022, C-368/20 and C-369/20, N/Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298). Owing to the pandemic, 18 Member States reintroduced border control at their borders with other Member States; see for an overview: C. Dumbrava, ‘Schengen Reform – Key Challenges and Proposal’, *European Parliamentary Research Service (EPRS) Briefing* July 2022, no. PE 733.599.

4 Since the fall of the Berlin Wall and the disappearance of the Iron Curtain, new walls and fences have been erected, for example, in Greece, Hungary and around the Spanish enclaves in Morocco, Ceuta and Melilla.

EU-UK border.<sup>5</sup> Crossing borders triggers the taxation of goods and services, and of royalty payments, interest payments and dividends. The current geopolitical climate has seen an increase in export control, sanctions and control of foreign direct investments. These are all cross-border events where passing the border triggers the application of a rule of law.

With globalisation and digitisation, events and cases have increasingly become transnational. Consequently, the facts of one single case can be located in more than one state. This leads to questions about which laws apply in transnational cases; this goes for any law, and in this research specifically EU law. Is it the legislation of that one state, or only the legislation of the other? Or is it the legislation of both jurisdictions.

For example, when competitors, established in the United States, meet somewhere in the United States and agree to raise their sales prices for customers established in the EU (which constitutes a prohibited price-fixing cartel under Art. 101 TFEU), their behaviour will affect the EU's internal market to the detriment of customers established in the EU. EU competition law applies in this situation, even though the 'offenders' are not established in the EU and the offence did not take place within the EU: it was implemented in the EU when selling the cartelised products to EU customers. In fact, it is the customer's place of establishment which constitutes the sufficiently close connection to the EU territory for EU competition law to apply (see Section 4.2).

Despite the globalisation and increase of transnational cases, legislation is still confined to the territory of a state. Since the EU has no territory of its 'own', EU territory is the sum of the Member States' territories (Chapter 2). The geographical area within which legislation

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5 Although with respect to goods there is no hard EU/UK border between Northern Ireland and Ireland, in practice, there is a border between Northern Ireland and the UK. After the UK withdrew from the EU (Brexit), Northern Ireland remained *de facto* within the internal market with respect to goods, allowing goods to travel freely from Northern Ireland to and from Ireland based on the Protocol on Ireland/Northern Ireland; protocol to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020, L29/7). Consequently, the goods coming from the UK to Northern Ireland were not allowed to go through the border with Ireland without custom duties. Because of all the additional paperwork this caused, for goods travelling from the UK to Northern Ireland, the EU and UK renegotiated the Northern-Ireland Protocol and came to a new agreement called the Windsor Framework on 23 February 2023; [https://commission.europa.eu/publications/windsor-political-declaration-european-commission-and-government-united-kingdom\\_en](https://commission.europa.eu/publications/windsor-political-declaration-european-commission-and-government-united-kingdom_en).

applies is defined by the territorial scope of that legislation. EU law applies territorially to cases which have a sufficiently close connection to EU territory (Chapter 4).

Most of the research in relation to the territorial scope of EU law is limited to the main provisions on the territorial scope of EU law: Article 52 TEU and Article 355 TFEU. This seems logical: EU applies to the whole territory of a Member State (according to Art. 52 TEU), unless it is otherwise defined by Article 355 TFEU, which refers to a limited number of specific regions of only seven Member States. But more than once, EU legislation deviates from the straightforward system of these two provisions.

For example, when the EU legislature tried to combat tax evasion on savings, the Council of the EU adopted the Savings Directive.<sup>6</sup> This is secondary EU legislation in the context of the internal market; the territorial scope of such a directive is then, in principle, limited to the internal market (see Section 3.3). Because the Council was afraid of money being easily transferred from the internal market to jurisdictions outside the internal market where the Savings Directive did not apply, the territorial scope of the Savings Directive was extended to jurisdictions outside the internal market. Consequently, the EU concluded treaties with third countries containing the same rules as the Savings Directive (see Section 3.8.1). Furthermore, the Kingdom of the Netherlands and the United Kingdom (still a Member State at that time) were required to commit to extending the rules of the Savings Directive to their overseas countries and territories in the Caribbean (OCT) (see Section 3.7.1).

My research taught me that mapping the territorial scope of EU law is much more complicated than following only the mechanisms provided for by Article 52 TEU and Article 355 TFEU. Why? Because other mechanisms influence the territorial scope of EU law, too (see on the term ‘mechanism’ further Section 1.2.1). Mapping the territorial scope of a specific rule of EU law is not a straightforward and easy task and in the past has been considered a ‘labyrinth.’<sup>7</sup> This is caused by the many different mechanisms which can apply simultaneously to a rule of EU law. The lack of clarity creates uncertainty as to the

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6 Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ 2003, L157/38). Even though this directive was repealed by Directive 2015/2060 (OJ 2015, L301/1), I use this example, since it proves the existence of two mechanisms influencing the territorial scope of EU law. This proof is not undone by the fact that the Savings Directive has been repealed.

7 Vandekerckhove characterises EU private international law as a labyrinth owing to all the opt-outs; K. Vandekerckhove, ‘Een Europees labyrint: het geografisch toepassingsgebied van de Brussel-I Verordening en aanverwante Europese wetgeving van internationaal privaatrecht en burgerlijk procesrecht’, *Nederlands tijdschrift voor Europees recht* 2009/3, p. 90.

applicable substantive law, especially in regions like the OCT.<sup>8</sup> This lack of clarity may affect political discussions at the legislative level and consequently hinder new legislation from emerging or lower its quality, or it may even confuse judges.

For example, after hurricanes Irma and Maria struck a large part of the northern part of the Caribbean in 2017, the question about whether EU funds were available arose. The Caribbean includes territory of EU Member States, and some OCTs and outermost regions were hit. In the case of natural disasters, like a hurricane, the European Union Solidarity Fund provides funds for the restoration of damaged key infrastructure. These funds were only available to the outermost regions and not to the OCTs.<sup>9</sup> Some journalists thought the difference in treatment was a consequence of the national legislation of the Member States which granted more autonomy to the OCTs than to the outermost regions.<sup>10</sup>

Another example can be found in the answers which were given to an online questionnaire and subsequent interviews I had with several judges from the Caribbean parts of the Kingdom of the Netherlands. They applied EU law and referred to case law of the European Court of Justice (ECJ), but the Dutch Caribbean judges wrongly thought that they were not competent to make a preliminary reference to the ECJ, because their OCTs were not a Member State.<sup>11</sup> They wrongly considered their OCT to be on a par with third countries instead of understanding that their OCTs are on a par with other autonomous regions of the Member States and that, therefore, their OCTs were part of a Member State. The judges from an OCT can therefore make a reference for a

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8 C. de Bernardi, *L'Applicabilité du droit international et du droit communautaire dans les territoires d'outre-mer français*, Paris: Ellipses 1998, p. 144.

9 Despite the logic behind a different status under EU law (created by Art. 355(1) and (2) TFEU), MEPs indicated that from a solidarity point of view, this difference was not logical, since both the Dutch citizens on Sint Maarten and the French citizens on Saint Martin are EU citizens; see the remarks and questions of MEPs Maurice Ponga and Agnes Jongerius (Verbatim report of proceedings of 13 September 2017, nos. 3-614-0000 and 3-615-0000, pp. 188-189).

10 Th. Vandamme, 'Orkaan 'Irma' en de positie van Sint Maarten in de Europese én Nederlandse Unie', *EU Explainer* 25 September 2017, <https://euexplainer.nl/2017/09/orkaan-irma-en-de-positie-van-sint-maarten-in-de-europese-en-nederlandse-unie/>; W.W. Geursen, 'EU Solidariteitssubsidie voor het Franse Saint Martin en niet voor Sint Maarten; hoe zit dat?!', *LinkedIn article*, 12 September 2017, <https://www.linkedin.com/pulse/eu-solidariteitssubsidie-voor-het-franse-saint-martin-wessel-geursen/>.

11 W.W. Geursen, 'No Preliminary References from Dutch Overseas Judges: Is It Tambu or Tumba Dancing with the Court of Justice?', in: J. Krommendijk (ed.), 'It Takes Two to Tango: Takes Two to Tango: The Reference Dance Between the Court of Justice of the European Union and National Courts', *European Papers* 2020/2, pp. 755.

preliminary ruling to the ECJ just as their ‘peer’ judges in, for example, an autonomous Spanish province, the German *Länder* or a Belgian *Gewest*.

The purpose of this research is to clarify the complex issue of mapping the territorial scope of EU law. This research demonstrates that there are 28 mechanisms which must be taken into account to determine the territorial scope of specific rule of EU law. Following these mechanisms will get one out of what is perceived as a ‘labyrinth.’<sup>12</sup>

## 1.2 RESEARCH QUESTION AND CURRENT STATE OF RESEARCH

### 1.2.1 Research Question

One cannot determine the territorial scope of EU law in an abstract manner; it should be done concretely with regard to one specific rule of EU law, in relation to one or more specific geographical areas where the facts of a case are located, and with regard to the specific facts of a case which should have a sufficiently close connection with EU territory.

For example, one can ask whether a specific right contained in the Charter of Fundamental Rights of the European Union applies when a Frontex mission is operating in international waters and encounters third-country nationals in peril.<sup>13</sup>

Or one can ask whether the VAT directive applies on a cruise ship sailing under the flag of an EU Member State in international waters when products are sold to the passengers while the ship is sailing the high seas and equally whether the General Data Protection Regulation (GDPR) applies when registering personal data of these passengers.

Or one can ask whether the EU state aid rules apply to a specific outermost region of a Member State, when the local government intends to subsidise a renewable energy project there.

12 Following the mechanisms is then similar to the ball of yarn which prevented Theseus from getting lost in the labyrinth on Crete. According to the Greek mythology, Ariadne gave Theseus a ball of yarn to escape from the labyrinth on Crete after he killed the minotaur which was imprisoned in the labyrinth by king Minos, father of Ariadne.

13 A. Baldaccini, ‘Extraterritorial Border Controls in the Eu: The Role of Frontex in Operations at Sea’, in: B. Ryan, V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, Leiden: Nijhoff, 2010, p. 225; T. Strik, ‘Fundamental Rights as the Cornerstone of Schengen’, *European Journal of Migration and Law* 2021/4, p. 508 and T. Strik, ‘Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations’, *European Parliament Committee on Civil Liberties, Justice and Home Affairs*, 14.7.2021, PE692.887v01-00.