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### I. On the spread of EU law

The global reach and effects of EU law,<sup>1</sup> or simply put for now, the ‘spread’ of EU law is increasingly the subject of *legal* scholarship, which considers a broad range of its manifestations to other legal orders or systems, organisations or third countries, as an empirical phenomenon. For example, the so-called ‘Brussels effect’ is the subject of recent scholarship, assessing the perceived ‘spillover’ effect of EU regulatory standards on US rules in the realm of *inter alia* genetically modified foods, data privacy standards and chemical safety rules.<sup>2</sup> Equally, recent accounts consider the extent to which EU legal rules are actually transplanted in the US:- for example, the transposition of EU environmental standards in California, Boston and Maine.<sup>3</sup> Included in these theorisations is the view that the size and scale of the EU, as a market and as a polity, has generated what is understood here as ‘rule-transfer’. It has entailed that the EU has adopted rules and standards that other polities and markets have in turn adopted, compelled to do so or acting out of sheer necessity. This process of the ‘outwards’ adoption of EU rules elsewhere, particularly in the US, is conceptualised in various legal accounts. This concerns the *actual* practice-based transfer of rules, less so the *process* and the significance of the EU’s promotion of norms. Such accounts offer normative explanations that are often dominated by market-based rationalisations, such as economic power, less so convergence or convenience.<sup>4</sup> However, as will be argued here, economic arguments may be insufficiently nuanced to similar practices of rule-making beyond economic areas. Legal and other scholarship examining the external adoption of EU rules usually relies upon economic-based rationales to understand the process and outcome of such ‘rule-transfer’, which is developed below. Similarly, convenience, mimicry, expertise, innovation and other technocratic rationales offer normative explanations for such transfers.<sup>5</sup> Very high EU legal standards as much as very low national standards may be equally open to ‘mimicry’, even where the social benefits come at a great economic cost.<sup>6</sup> Within the context of the US, the openness of federalism is depicted as an explanation for this rule-transfer, whereby the legal order at State level is inherently open to receiving best practices from external sources, constitutionally-speaking.<sup>7</sup> This is argued here to be an excessively ‘structural’ account of such rule-transfer and not necessarily a very holistic account of the global reach and effects of EU law. At the other end of the spectrum, it has been recently argued that transfers of policies from the EU to the US, e.g. in socio-economic areas, is inherently democracy-enhancing in so far as it purports to set high standards, which this account considers in detail.<sup>8</sup> Nonetheless, the normative story of the global reach and effects of EU law is innately bound up with the process surrounding it and it is one which this book seeks to develop further.

<sup>1</sup> For clarity, EU law is referred to here as incorporating EU rule-making.

<sup>2</sup> See Anu Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University LR* 1.

<sup>3</sup> Joanne Scott, ‘From Brussels with Love: the Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction’ (2009) 57 *AJCL* 897.

<sup>4</sup> Zaidi Laïdi, ‘European preferences and their reception’, in Zaidi Laïdi (ed), *EU Foreign Policy in a Globalized World. Normative Power and Social Preferences* (Routledge 2008) 1; R. Dan Kelemen, ‘Globalizing European Union Environmental Policy’ (2010) 17 *JEPP* 335; Gregory Shaffer and Daniel Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1 *TEL* 31.

<sup>5</sup> See Shaffer and Bodansky, *ibid*; Kelemen, *ibid*; R. Dan Kelemen and David Vogel, ‘Trading Places: The Role of the United States and the European Union in International Environmental Politics’ (2010) 43 *CPS* 427.

<sup>6</sup> Consider regulatory competition across the EU and beyond it to introduce smoking bans in bars, the law on the sale- or alternatively use of plastic bags in retail. See ‘Smoking curbs: the global picture’ (3 February 2011) <<http://www.bbc.com/news/world-11845158>> accessed 23 December 2015.

<sup>7</sup> For example, Judith Resnik, Joshua Civin and Joseph Frueh, ‘Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)’ (2008) 50 *Arizona LR* 709; Judith Resnik, ‘Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism’ (2007) 57 *Emory LJ* 31.

<sup>8</sup> For example, Katarina Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* (OUP 2013).

This book broadly explores what the ‘global reach and effects’ of EU law entails, theoretically, empirically and practically. It seeks deliberately to look beyond ‘headline’ approaches to the global reach of EU law in understanding EU rule-making, while also closely examining what is meant by the EU’s self-expressed ‘global approach’ to EU rule-making or external dimensions to internal rule-making.<sup>9</sup> It focusses upon drawing together two specific strands so as to offer an integrated account of rule-making processes:- (i) how the EU promotes external norms and (ii) its relationship to internal rule-making. This focus draws from the evolution in legal scholarship of predominantly empirical work, whereby EU law scholars have charted the adoption in the US of vast ranges of EU rules in very recent times, as well as the broader idea of the global impact or spread of EU law.<sup>10</sup> However, for all of their merits, there may be said to be many shortcomings of existing studies outlined above. The distinctions drawn there raise fundamental methodological issues which are explored here further:- for example, what analytical method is best used, what is being transferred, why and how? And is it legitimate or transparent what EU law achieves? And what is explicitly aimed at in rule-making?

One specific *theoretical* methodology used to sketch the broader themes of this account and explore specific casestudies is the phenomenon of ‘EU rule-transfer’, expanded upon here next. More *practically*, the book traces norm promotion in rule-making and purports to carefully identify and separate the external from the internal in distinct case studies. It is argued that defined methodologies are only embryonic in EU law scholarship. For example, there is currently a movement in scholarship to reconstruct methodology and take into account the multi-disciplinarity of the subject, its highly diverse range of actors, instruments and processes.<sup>11</sup> It advocates approaches which accommodate *inter alia* the plurality of sources of EU law and which explicitly enunciate its method. An attempt to trace transparently a source-based construction of EU rule-making is argued here to accommodate contemporary concerns rather than conform to the practices of other disciplines and subject-confines, usually structured interviews or practice-based accounts.

## II. On EU Rule-Making

EU rule-making has long existed as a ‘black box’ within European Union (EU) law scholarship, whereby a limited amount of traceable output thereof has become the subject of vast sectors of scholarship. The ‘black box’ itself has become more transparent, traceable and accessible over time.<sup>12</sup> Yet still to speak about EU rule-making poses elementary questions as to its meaning that may appear striking. There is no common, standard description of EU ‘rule-making’ that is shared across disciplines in a holistic sense. Instead, temporal stages of *inter alia* lobbying, negotiation, consultation and input, decision-making, implementation, enforcement and judicial decision-making in EU law have been analytically developed piecemeal by legal scholars, often later than other disciplines on the same fields.<sup>13</sup> The absence of such an understanding of EU rule-making is argued here to emasculate

<sup>9</sup> See Ch. 2.

<sup>10</sup> See Bradford, n 2; Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 AJCL87; Joanne Scott, ‘The New EU Extra-territoriality’ (2014) 51 CMLR 1343.

<sup>11</sup> See Rob van Gestel, and Hans-W. Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 ELJ, 292, 313-316 (‘An Agenda for a European Debate’); See Vauchez (n 1); Tamara Hervey, Robert Cryer, Bal Sokhi-Bulley, Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011); Rob van Gestel, Hans-W. Micklitz and Miguel Poiares Maduro, ‘Methodology in the New Legal World,’ *EUI Law Working Paper* 2012/ 13; Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds), *European Legal Method* (DJOF 2011); cf ‘The New History of EU law’ project, University of Copenhagen: <<http://europeanlaw.saxo.ku.dk/>> accessed 23 December 2015.

<sup>12</sup> On recent efforts to deploy this terminology and thereby reconstruct the history of EU law, see Antoine Vauchez and Bruno De Witte, *Lawyer Europe. European Law as a Transnational Social Field* (Hart 2013).

<sup>13</sup> The subject of many recent monographs: for example on enforcement: Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012); On negotiation and conclusion of international agreements: Henri de Waele and Jan Jap Kuipers (eds), *The European Union’s Emerging International Identity: Views from the Global Arena* (BRILL 2013); Piet Eeckhout, *EU External Relations Law* (2nd ed, OUP, 2011); Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013); on rule-making: Joana Mendes *Participation in Rule-Making: A*

transparency. Accordingly, this account considers EU rule-making in a holistic sense, both as a process and as a normative idea and specifically focusses upon understanding its methodology from a legal perspective. It uses the term ‘rule-making’ so as to encompass active and dynamic practices arising in postnational rule-making, that may not fit conventional or traditional models of law-making or specific understandings of ‘law.’<sup>14</sup> This terminology draws a wider lens so as to capture its impact as postnational rule-making, focusing upon its method, its instruments and aims in a global context. This particular approach of focusing upon methodology also involves tracing its active or ‘bottom-up’ construction in various casestudies.

No rule-making project, whether a new legal order or constitution or otherwise has ever truly begun as a *tabula rasa*. They have influences, sources and borrowings that are commonplace, which range from the formal and explicit to the informal, osmotic or organic.<sup>15</sup> EU rule-making has never been reluctant to draw inspiration, emulation or to replicate best international standards, practices or rules of its Member States.<sup>16</sup> As the EU as an organization evolves, its strategic internalization of external norms has also evolved. Similarly, the global impact of its rules and choices have too. There are distinct normative challenges posed by an inherent openness to absorbing, emulating or integrating all international standards, Member State existent standards and values. Furthermore, the scale of the EU as an economic bloc and its evolving reputation as a global governance actor renders the adoption of its rules mandatory, essential or simply useful for many outside of its territory, creating issues of social acceptance and legitimacy. To study *how* the EU engages in rule-making and its effects and thus involves studying an ecosystem of processes. What this book focusses upon then is the unpacking of the ‘ecosystem’ of EU rule-making processes. Its study is argued to demand a particularly integrated view of the ‘internal’ and ‘external’ of the EU law, one which is advocated here to be conducted through developing a methodology of EU rule-making.

This book thus takes as its central theme two specific issues- (i) understanding *conceptually* the global reach and effects of EU law, including its democratizing and legitimizing effects and challenges, which are argued to be inadequately exposed and (ii), understanding the methodology of EU rule-making processes in this context through the lens of ‘EU rule-transfer’ and select security-based case studies. As a result, this book considers what specific impact and effects are the EU’s rules having? What is the EU trying to do when it uses external norms? What third parties are accepting the EU’s rules and why? What rules, standards or values is the EU accepting? And what relationship do its practices have to international political processes that it participates in?

### III. Using EU Rule-Transfer to frame the Global Reach of EU Law

This book provides a legal theorisation of the global reach and effects of EU law conducted through rule-transfer. As a multi-directional phenomenon, with internal and external and inwards and

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*Rights-Based Approach* (OUP 2011).

<sup>14</sup> See Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds) *Informal International Lawmaking* (OUP 2012); On postnational rule-making, see Karl H. Ladeur, ‘The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law - From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships’ *Law No. 99/3, EUI Working Papers*; Erik Eriksen, Christian Joerges, Florian Rödl (eds) *Law, Democracy and Solidarity in a Post-national Union: the Unsettled Political Order of Europe* (Routledge 2008); Erik Eriksen, Christian Joerges and Florian Rödl (eds) ‘Law and Democracy in the Post-National Union’ *Arena Report* 1/2006; Damian Chalmers, ‘Post-nationalism and the quest for constitutional substitutes’ (2000) 27 *JLS* 178; Neil Walker, ‘Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms’ (2012) 3 *T LT* 61; Gregory Shaffer, ‘A Transnational Take on Krisch’s Pluralist Structure of Postnational Law’ (2012) 23 *EJIL* 565; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2011).

<sup>15</sup> This has long been the study of the subject of comparative law: see Pierre Le Grand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions* (CUP, 2003); H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, (4th edn, OUP 2010).

<sup>16</sup> See the early effort of the Court of Justice in the landmark *Handelsgesellschaft* decision on fundamental rights to incorporate as many national standards so as to construct a de jure European property right: Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114 [1970] ECR-I 1125.

outwards dimensions, it is argued to have both positive and negative effects for democracy, offering insights into the flourishing as much as the failings of EU integration processes. *Outwards* EU rule-transfer is demonstrated through a series of casestudies to manifest itself in largely economic-orientated domains and is widely accounted as being ‘democracy enhancing’ for its recipients or is perceived as beneficial, market enhancing, market creating or sustaining.<sup>17</sup> Existing accounts are argued not to be sufficiently nuanced to the relationship between direct and indirect outwards rule-transfer. The legitimacy of these processes is argued to be sometimes questionable and highly variable and dependent upon social acceptance thereof. By contrast, *inwards* rule-transfer irrespective of whether the EU is the initial source of rules or simply where external sources and norms are transferred, largely tends to create contexts whereby democracy is perceived to be thwarted or adversely impacted through such transfers. This is shown to occur more frequently in non-economically oriented areas. External norms are often used by the EU to legitimize these same processes, particularly in these non-economic fields.<sup>18</sup> In this regard, this book considers the question of the *social legitimacy* of the operation of inwards and outwards EU rule-transfer, i.e. its external acceptance by third countries, parties and organisations. In sociological terms, even if it is an objective fact, legitimacy is socially constructed.<sup>19</sup> Legitimacy is a multi-faceted entity which comprises both social credibility and social acceptance. It may be pragmatic or normatively or cognitively-based and is not necessarily a study of legal formalism or legal validity. Legitimacy can differ across time and space and between actors, systems and contexts and is characterised by malleability. It may change but may also be resilient.<sup>20</sup> Legal scholarship often focusses upon normative or cognitive bases of legitimacy rather than on whether ‘X’ is regarded as legitimate.<sup>21</sup> It is argued here that to focus upon questions of social legitimacy assists in opening up EU rule-making practices. Theorisations excessively dependent upon sociological and/ or behavioural analysis take undue advantage of the malleability of vocabulary at the expense of analytical sharpness. Nonetheless, many practices of postnational rule-making are argued here to be heavily dependent upon their acceptance and it is this lens which is deployed here.<sup>22</sup> The intersection and relationship between the internal and external in EU law is argued to be of much significance in understanding these questions and is the subject of many casestudies here, Chapters 4 and 5 (AFSJ Rule-Making and AFSJ Data Transfer) (inwards) and Chapter 6 (cybercrime and cybersecurity) (outwards).

The book argues that the shortcomings of inwards-transfers tend to be difficult to ‘compensate’ for ‘downstream’ in EU rule-making processes, which will be demonstrated amply by certain casestudies, for example, on EU data transfer (in Chapter 5). These shortcomings tend to be difficult to correct and can evoke a misplaced faith in the *ex ante* ‘corrective’ power of EU civil society or *ex post facto* judicial review.<sup>23</sup> EU rule-making processes generally involve demanding standards and strive for the highest possible goals in law, policy and implementation. They generate what is known as the ‘perfectionism’ conundrum of EU law.<sup>24</sup> Even where EU rule-making is explicitly minimalist, it

<sup>17</sup> See Josephine Van Zeben, *The Allocation of Competence in the European Trading Emissions Scheme* (CUP 2014) (outwards participation in the global legal order); Chad Damro, ‘Market Power Europe’ (2012) 19 JEPP 682 (outwards transfers of rules); See from a fundamental rights perspective, Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014), juxtaposing transnational law and fundamental rights and outwards focussed participation in transnational law.

<sup>18</sup> As will be argued in Ch.4.

<sup>19</sup> W. Richard Scott, *Institutions and Organizations* (SAGE 2001).

<sup>20</sup> James Gibson and Gregory Caldeira, ‘The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support’ (1995) 89 APSR 356.

<sup>21</sup> Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation and Governance* 137.

<sup>22</sup> Ellen Cohn, Susan White, *Legal Socialization: A Study of Norms and Rules* (Springer-Verlag, 1990); Ellen Cohn et al, ‘An integrated model of legal and moral reasoning and rule-violating behaviour: The role of legal attitudes’ (1990) 34 *Law and Human Behaviour* 295.

<sup>23</sup> Beate Kohler-Koch and Christine Quittkat, *De-Mystification of Participatory Democracy EU-Governance and Civil Society* (OUP 2013). Contrast Yannis Papadopoulos, *Democracy in Crisis? Politics, Governance and Policy*, (Palgrave Macmillan 2013) 79.

<sup>24</sup> Jacco Bamhoff, ‘Perfectionism in European Law’ (2011-2012) 14 *CYELS* 75; Damian Chalmers, ‘Gauging the cumberdoms of EU law’ (2009) 62(1) *CLP* 405. See, by contrast, the discussion in the context of European Private law by Martijn Hesselink, ‘Private Law

remains dominated by concerns for ‘perfect’ effectiveness in its enforcement and measurements, manifesting itself in the use of e.g. Scoreboards.<sup>25</sup> Paradoxically, perfectionism in EU rule-making exists *ex ante*- from the outset- rather than *ex post*. It thus contrasts with the significance of judicial activism or judicial discretion in EU law, contributing to ‘expansionism’ as a broader normative theme of EU law scholarship.<sup>26</sup> The external expansion of the EU of, for example, its territory, directly or indirectly through rule-making as a result of its economic prowess and/ or its use of competences, clashes with EU ‘perfectionism’.<sup>27</sup> A focus then on methodology is argued to accommodate a bifurcated analysis of rule-making, which looks both internally and externally at its manifestations. It thus offers a more substantive and holistic theorization of EU rule-making. As a result, this book focusses upon the relationship between what will be developed here as outwards and inwards ‘rule-transfer’ from a legal perspective, through internal and external interlinked casestudies. Furthermore, it examines questions of legitimacy and democracy in rule-transfer and their inter-relationship. Specifically, this book also considers the rule-making that the EU concludes with its external partners where these instruments are later adopted internally, as much as the transfer or movement of norms by the EU. As such, the focus of the text is upon the EU but is not limited to a study of its enlargement practices, accession, conditionality or development as rule-transfer would conventionally dictate.

#### *i. Defining and developing EU Rule-Transfer*

This account purports to develop, through casestudies, a specific legal understanding of the term ‘rule-transfer’. Of course, this begs the question as to what rule-transfer is and why would a legal account use it? ‘Rule transfer’ may be described as a term of art of political science and international relations scholarship which is concerned with how the EU evolves as an organization through rule-making processes. Rule-transfer is formally understood as a means or process by which EU legal rules are adopted in third country legal orders. Rule-transfer is conventionally deployed in at least three ways in non-legal scholarship on governance and in particular on accession to the EU and EU development policies, so as to depict, firstly, the mandatory transposition of EU rules in third countries, secondly, the non-mandatory transposition of EU rules in third countries and thirdly, the extension of EU governance.<sup>28</sup> It is a term deployed predominantly in non-legal scholarship on governance and policy development, which focusses upon the reasons for the adoption of rules by the EU or promotion of the adoption of rules.<sup>29</sup> However, it has a distinctive legal component, given that it has as its subject and/ or object legal rules. And while such taxonomy of this literature can be formulated, it is important to state that there is a wide deployment of the *term without definition* in

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Principles, Pluralism and Perfectionism,’ *Centre for the Study of European Contract Law Working Paper Series* No. 2013-02; Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 21; Hugh Collins *The European Civil Code The Way Forward* (CUP 2008) 165. On the Architecture of the rule-making processes and European Private Law: see Hugh Collins ‘Regulatory Competition in International Trade: Transnational Regulation through Standard Form Contracts’ (Talk delivered at the University of Amsterdam, 2013), available as a video on <[www.arils.uva.nl](http://www.arils.uva.nl)> last accessed 23 December 2015.

<sup>25</sup> That is to measure enforcement. This is now also part of the AFSJ since 2013 also: EU Justice Scoreboard <[http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm)> last accessed 23 December 2015.

<sup>26</sup> See Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe’s Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013); Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012); Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013).

<sup>27</sup> See n 24.

<sup>28</sup> Sandra Lavenex, ‘The power of functionalist extension: how EU rules travel’ (2014) 21(6) JEPP 885.

<sup>29</sup> See, for example, its use without any formal definition of its legal content by Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by conditionality: EU rule transfer to the candidate countries of Central and European Europe,’ (2004) 11 JEPP 669; Sandra Lavenex and Frank Schimmelfennig (eds), *EU External Governance. Projecting EU Rules Beyond Membership*, (Routledge 2010). See, for example, the account of Mathieu Rousselin, ‘But why would they do that? European External Governance and the Domestic Preferences of Rule Importers’ (2012) 8 *Journal of Contemporary European Research* 470, examining the reasons for the process of rule transfer; Mathieu Rousselin, ‘Constraint and Consent in the Transfer of European Rules: The Case of China’ (2014) 19 EFAR 121.

governance scholarship, which instead focusses upon its character as a form of external governance.<sup>30</sup> Rule-transfer is *stricto sensu* derived from strands of Europeanization and governance scholarship, within the boundaries of political science and international relations. It encompasses both internal and external questions of aspirant Member States, the adoption of EU rules and of candidate and EU conduct. Usually, it concerns the process and methods of conditionality in accession to the European Union (EU), through the adoption by candidate countries of the *acquis communautaire*. Yet it has an almost seamless application from the European Neighbourhood Policy,<sup>31</sup> accession and Enlargement, to the adoption of EU rules in China.<sup>32</sup> More generally and of significance to the present account, it is understood as the external projection of EU rules, standards or policies.<sup>33</sup> Governance scholarship deploys the specific term ‘governance seekers’ so as to depict the ‘users’ of rule-transfer.<sup>34</sup> It doing so, the lexicon of such scholarship is permeated by an implicit valorisation of the users of EU rules. It seeks to depict in very clear-cut terms the *nature* and *actors* of the processes, but less so the means used. Moreover, relatedly, to depict the role of the US as portrayed in Bradford’s ‘Brussels Effect’ as a ‘governance seeker’ vis a vis the EU,<sup>35</sup> might be said to pose assumptions as to power dynamics that are not necessarily objectively testable. Also normatively, as much as linguistically, it presents a challenge within a crowded rubric. How can one assess its legitimacy and effectiveness within this dynamic of designated takers and seekers if it presupposes the legitimacy of the nature of the rules?

The combined perspective of law and governance presents diverse visions of the phenomenon studied here. Recent legal scholarship draws a sharp distinction between the EU’s outwards transfer of legal rules and governance practices externally.<sup>36</sup> In doing so, they argue that the transfer of rules constitutes an exportation of rules alone and is separate or apart from governance. However, this book argues that contemporary rule-making suggests otherwise and that law and governance may have a complex combined function, warranting a closer focus upon method. For example, practices in evolving fields, traditionally sacrosanct for the Nation State such as security, do not necessarily support this reasoning. For example, when the EU imports EU-US ‘security’ rules into its *own* legal order, one witnesses a transfer of law and governance.<sup>37</sup> There may be thus a fusion of rules and governance practices together in certain subject areas- such as security- where the transfer of rules themselves may be insufficient without incorporating governance mechanisms together.

#### ii. *Developing the legal components of rule-transfer*

The analysis in non-legal scholarship of the process of the adoption of EU rules in EU candidate accession States increasingly appears highly formalistic in contrast with emerging empirical work of legal scholars.<sup>38</sup> Existing scholarship on rule-transfer is also argued here to offer a limited perspective on integration between legal orders or even may be said to be currently blinkered to its legal content. It underestimates and even excludes the promotion of and success of the transfer of EU law.

<sup>30</sup> Eg Lavenex and Schimmelfennig (n 29).

<sup>31</sup> Lavenex (n 28).

<sup>32</sup> See Mathieu Rousselin, ‘The EU as a Multilateral Rule Exporter. The Global Transfer of European Rules via International Organizations,’ KFG Working Paper Series, No. 48, November 2012, *Kolleg-Forschergruppe* (KFG) ‘The Transformative Power of Europe’ *Freie Universität Berlin*.

<sup>33</sup> See one of the few (holistic) legal accounts of these processes, focussing upon Central and Eastern European Enlargement: Wojciech Sadurski, *Constitutionalism and Enlargement in Europe* (OUP 2012).

<sup>34</sup> Rousselin (n 29).

<sup>35</sup> *Ibid.*

<sup>36</sup> See Grainne De Búrca, ‘EU External Relations: The Governance Mode of Foreign Policy’ in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (OUP 2013) 39.

<sup>37</sup> See Elaine Fahey, ‘Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program’ (2013) 32 YEL1. Security is employed here as shorthand expression for rules related to the Area of Freedom, Security and Justice and it is this dimension of the AFSJ which is focussed upon rather than rights, remedies or redress concerns usually associated with analyses of AFSJ rule-making.

<sup>38</sup> For example, Bradford (n 2).

Irrespective of its definition, its legal component may be said to be ‘dominant’, given that it depicts EU legal rules being accepted and adopted outside the EU, often for accession *to* the EU. However, the relevance or centrality of legal rules and legal theorisations of rule-making processes do not form part of existing scholarship.<sup>39</sup>

While rule-transfer may be predominantly about legal rules, it remains a topic ‘apart’ from legal scholarship. However, it is argued here that rule-transfer invariably has both a legal component and a legal objective and, as will be explored here, mostly has components with both internal and external facets. It is argued to accommodate the need for methodology in studying EU rule-making from a legal perspective. It is also accommodates well the *behavioural* direction of EU law analysis, commenting upon EU action as social practices, socializing behaviour in the global legal order, causation dynamics as well as their legitimacy.

EU rule-transfer conventionally concerns the external functioning of EU law (eg within accession states) and internal ideals (‘the EU’) *through and by* law. Rule-transfer thus usually concerns democratic processes whereby the rule of law is developed. It carries a particular assumption as to the democratic benefits of the operation of EU law upon its subjects. As a result, one may say that its normative edge tends often to appear blunt or perhaps a bit hollow because EU rule-transfer is the means and the end thereof. Rather, the legitimacy and the effectiveness of these processes is subsumed within an analysis from the outset. Nevertheless, it offers a particular empirical or practical insight into the EU’s role in the world and its global impact through law. The study of rule-transfer is argued to offer a practical insight into the EU’s role in the world and its global impact. Such a study is of course more usually ‘internally’ focused rather than externally so- i.e. upon the EU and its subjects rather than the world. As a result, this book draws from EU rule-transfer in substance, scope, method and outlook by an explicit development of its theorization beyond its conventional contours. The book deploys the term to depict internal and external focused methods of rule-making. It deploys the term to depict the movement of rules and deploys the term to include the external acceptance or adoption of EU law.

### iii. *Distinguishing Europeanisation, Policy Diffusion, Transposition and Rule-Exportation*

For the purposes of this account, rule-transfer must be distinguished and separated from various other methods of depicting processes of the ‘movement’ of EU rules, e.g. Europeanisation, policy diffusion, transposition and rule-exportation. Firstly, *Europeanisation* is understood as reshaping politics in the domestic arena in ways that reflect policies, practices or references advanced through the EU systems of governance.<sup>40</sup> Just like rule-transfer, Europeanisation is a dynamic process but is factually limited to the period before and after the admission of a new Member States to the EU. It thus has no necessarily obvious or clear-cut application to third countries, who mirror, mimic or otherwise ‘take’ EU rules, a process which is considered in this book. Moreover, Europeanization is usually associated with institutionalization and specifically horizontal institutionalization,<sup>41</sup> through a widening of the

<sup>39</sup> Recent rule-transfer scholarship emphasises increasingly a narrative of the *functionalist extension of governance which travels* outside of the EU. This narrative of functionalist extension of governance divides up subject domains sharply. For example, Lavenex maintains that EU external relations display a ‘dual character’ such that a fundamental distinction exists between Type 1 and Type II (ESDP/ foreign policies versus territorially defined strategies for example ENP, EEA: Lavenex (n 28). See De Burca (n 36); Schimmelfennig and Sedelmeier, (n 29).

<sup>40</sup> Ian Bache and Andrew Jordan, *The Europeanization of British Politics* (Palgrave Macmillan 2008) 5; Fabrizio Caffagi et al, ‘Europeanization of Private Law in Central and Eastern Europe Countries (CEECs): Preliminary Findings and Research Agenda’ EUI LAW Working Paper 2010/15.

<sup>41</sup> Schimmelfennig and Sedelmeier (n 29).

group of actors whose actions and relationships are normatively structured. It must be acknowledged as having a highly specific technical and even technocratic meaning, one which has not been availed of much in legal scholarship.<sup>42</sup>

There is a body of international relations and political science scholarship describing the *diffusion of values* from the EU to the US legal order across legal fields.<sup>43</sup> Can we distinguish between forms of rule-transfer and mere policy diffusions?<sup>44</sup> Such questions demonstrate the importance of examining the normative rationale for rule-transfer and how it informs its definition, its direction, its content but also its subjects and objects, which are considered here throughout. However, this formulation focusses more upon the reasons for this diffusion rather than the process itself. While this scholarship draws more broadly across subjects, it focusses neither upon the methodology nor the normative content of rule-transfer.<sup>45</sup> Political science/ IR scholars sharply divide the effects of specific subject domains, in particular, the internal market and external relations.<sup>46</sup> However, legal accounts depicting variants of rule-transfer are either based upon projects of the external impact of internal market laws or the fluid intersection of the internal and external in EU. Such accounts have not captured the EU's most evolving and dynamic field, its Area of Freedom, Security and Justice (AFSJ) in their work. Even when they do, they adopt very narrow depictions of its components, despite its possible significance for this work. It is argued here that existing *legal* accounts conceptualise in limited fields the *actual* practice-based transfer of rules, less so the broader question of the *process* of the EU's promotion of norms. They also largely overlook developments in the AFSJ, despite evidence of their growing significance. It is further argued here that theorisations of EU rule-transfer as the functionalist extension of governance may have serious limitations, focussing unduly on the nature of the fields and less so their external or global effects and possibly being less suited to depict developments under analysis by legal scholars.

Literature on '*rule-exportation*' tends to have a heavy instrument-specific focus and is dominated by concerns for autonomy.<sup>47</sup> Also legal transplants do not focus upon the particularities of the supranational context- or even broader- international adoptions. Comparative law assumes that there are 'parent' legal orders and thus is a rough tool to capture the nuances of EU law as postnational rule-making. As Teubner states, there is a 'false dichotomy' arising from the binary image of recipients either repulsing or accepting legal transfers.<sup>48</sup> As such, his 'legal irritant' is indicative of legal transfers that do not automatically displace pre-existing legal meanings and practices but instead trigger a new set of unpredictable choices. Nevertheless, there are many conceptual shortcomings and limitations of the term 'legal irritant'.<sup>49</sup> Some have sought to suggest that legal transplants and legal irritants are one of the same family.<sup>50</sup> Others caution about paying too

<sup>42</sup> Caffagi et al, *ibid*.

<sup>43</sup> Linos (n 8); Gregory Shaffer, 'Globalization and Social Protection: The Impact of Foreign and International Rules in the Ratcheting Up of U.S. Privacy Standards,' (2001) 25 Yale JIL 1; Bradford (n 2); Scott (n 3); David Vogel *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press 2012).

<sup>44</sup> Linos (n 8); Claudio Radaelli, 'Diffusion without convergence: How political context shapes the adoption of regulatory impact assessment' (2005) 12(5) JEPP 26.

<sup>45</sup> David Bach and Abe Newman, 'Self-Regulatory Trajectories in the Shadow of Public Power: Resolving digital dilemmas in Europe and the United States' (2004) 17 Governance 387

<sup>46</sup> Lavenex (n 28).

<sup>47</sup> For example, European Private Law: Yane Svetiev and Hans Micklitz, 'Consumer Law Travels' (2013) 36(3) JCP 209; Yane Svetiev and Hans Micklitz, 'From Rule Export to Institution Building: Consumer Law at the EU's Doorsteps' (2013) 36 (3) JCP 1.

<sup>48</sup> Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11, 12.

<sup>49</sup> John Gillespie, 'Towards a discursive analysis of legal transfers into developing East Asia', (2008) 40(3) NYUJILP 657, 665.

<sup>50</sup> David Nelken, 'Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the study of Cross-Cultural Legal Adaptation' in Jiri Priban and David Nelken (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Aldershot 2001); David Nelken, 'Rethinking Legal Transfers' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2002).

much attention to descriptive metaphors in formulating theories.<sup>51</sup> Nor could it be adequately captured as a mere legal transplant, as studied by comparative law, capturing only haphazardly and micro-analytically specific instruments, rules or practices, less the overall process or overarching conduct of the EU and its relevance to global actions.

Language is inherent flexible and so the term of art ‘*legal transposition*’ has been devised to overcome limitations as to the ‘legal transplant’ terminology. However, it is argued here to have many limitations, especially in the EU context, for understanding the methodology of rule-making practices.<sup>52</sup> The transposition of legal rules is a concept which is an elementary, even rudimentary, part of EU rule-making. It forms an essential Member State’s obligations of its membership of the EU. As a result, the EU has been a fertile ground for those studying comparative implementation processes. Transposition in this sense depicts an implementation process as much as a legal phenomenon of EU law:-i.e. the mandatory obligation of loyal cooperation.<sup>53</sup> We may say that it depicts a highly formal, conventional and rather structured process. It is shielded as an internal process within or about the territory of the EU. Transposition is not usually deployed to depict more nuanced movements of rules from the EU *beyond* its borders. For example, transposition does not describe the acceptance by third countries of EU rules- nor is it understood to. Similarly, a process whereby the EU enacts rules with third countries which are then ‘evolved’ into internal EU rules is neither usually nor accurately captured by the formal legal term of transposition. There are many forms of adoption of EU rules beyond the territory of the EU that compel us to understand power dynamics and rule-making processes that may occur with or without intent for their movement. For this reason, the structure and formalism of the implementation process is argued to be a limited framework to consider rule-making.

#### IV. The casestudy of the EU’s Area of Freedom, Security and Justice

This leads to the more practical question of who are the *subjects and objects* of the process depicted here, EU rule-transfer and whether or how they may be separated. The focus of this work is on the specificity and taxonomy of practices, rules and instruments in the broader context of EU rule-making. Rule-transfer conventionally understood largely concerns instances of vertical authority, legal obligations and mandated transpositions from the EU to candidate countries. The practices of rule-transfer as understood here may concern transfers of instruments in the absence of any legal authority, between legal orders. This book is thus concerned with both external and internal transfer i.e. *both* outwards and inwards transfer. In this regard, rule-transfer is considered here as a means to study EU action, directly and indirectly, actively and passively, because it considers both acceptance and acquiescence by both the subjects and objects of rule-transfer.

There is a ‘directional’ specificity to all accounts that frames their subject and object in a specific way, which is dependent upon the subject matter. For example, European Private Lawyers have charted EU rule-export *outside* the EU, in a specific field where national authority and parental norms have a distinct role to play.<sup>54</sup> Rule-exportation in this context then is fundamentally a unidirectional idea, predicated upon institution-building. The ‘unidirectional’ nature of many casestudies on the success of the *outwards*-only transfer of EU rules to third countries and organizations may in reality be only part of the story. It is argued to fall short of depicting the operation of the global reach and effects of EU law as a holistic process. Rather, how the EU

<sup>51</sup> Gillespie (n 49).

<sup>52</sup> See Esin Orucu, ‘Law as Transposition’ (2002) 51 ICLQ 205, 208.

<sup>53</sup> See Marise Cremona (ed), *The Compliance and Enforcement of EU Law* (OUP 2012), xl.

<sup>54</sup> Micklitz and Svetiev (n 47).

strategically seeks external norms, exports *and* imports norms, which impacts upon the study of its subjects and objects, is explored here.

This account focusses upon one subject domain as the object of study where the ‘internal’ and ‘external’ dimensions to EU law, policy and governance are particularly pronounced and evolving: - in the EU’s AFSJ, a newly regularised part of EU law.<sup>55</sup> The relationship between the ‘internal’ and ‘external’ within EU law is argued to play a central role in the operation of the global reach and effects of EU law. It is a complex dichotomy and is under-explored in legal scholarship, arguably having fallen out of fashion in other disciplines for its sheer complexity or constant evolving state.<sup>56</sup> The AFSJ is argued to be instructive as to the operation of the global reach and effects of EU law through the study of rule-transfer. It is arguably the most sensitive and dynamic field of the EU, with a wide range of policies, governance and instruments, that has evolved heavily influenced by external norms. However, it is only newly regularized as a field and certain rule-making practices are under development. As will be explored here in Chapter 5, EU ‘internal’ security readily embraces ‘external’ security. EU security rules under development are argued to demonstrate the migratory effects of external rules by way of some form of ‘rule-transfer,’ i.e. the movement of rules between legal orders. Yet how we understand these specific rule-making processes, their evolution, their methodology or their taxonomy is an unfixed science. To subsume such processes within a characterisation of functional ‘movement’ alone (e.g. as rule-migration or exportation) risks bypassing ‘the bigger picture’. As a result, the EU’s AFSJ represents a useful casestudy on account of its evolving and dynamic content.

Legal scholarship tends to adopt a narrow understanding of EU security. It is largely limited as to former second pillar defence activities, or now Common Security and Defence Policy, responsibility to protect and dispute settlement or focusses upon the work of fledging EU security agencies.<sup>57</sup> Some recent non-legal scholarship has sought to develop a broader understanding of security beyond traditional definitions, to incorporate climate change, migration, piracy and counter-terrorism, as well as development aid.<sup>58</sup> Such a view is argued here to be consistent with contemporary EU rule-making and accordingly is adopted. Through casestudies this account systematically identifies external norm primacy in AFSJ rule-making. In doing so, it seeks to contribute to the debate on shifting practice in the understanding of security. The book also uses three specific casestudies (EU cybercrime and cybersecurity, AFSJ data transfer and Directives in the post-Lisbon AFSJ) with pronounced internal and external contours that represent evolving areas which are the subject of limited legal scholarship to date. As the subject and object of study, AFSJ has an advantage of being a dynamic area which is amenable to process-oriented study. There, the relationship between the ‘internal’ and ‘external’ is explicit, transparent and evolving. Through security-oriented casestudies focussing upon method, directionality, international political processes, the book formulates the global reach and effects of EU law as a phenomenon and process in a less-economically-oriented field. This approach has a broader appeal. Much scholarship of transnational law in particular is dedicated to dissecting its process-oriented structures or architecture whereas the

<sup>55</sup> On the regularisation of it as a domain of law as to enforcement, compliance, procedures, see Ch. 4.

<sup>56</sup> See Helena Carrapiço and Florian Trauner, ‘The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification’ (2012) 17 EFAR 1, table 1; Sandra Lavenex and Nicole Wichmann, ‘The External Governance of EU Internal Security’ (2009) 31(1) JEI 83; Florian Trauner, ‘The internal-external security nexus: more coherence under Lisbon?’ (EUISS Occasional Paper No 89, March 2011). See Elaine Fahey, ‘The EU’s Cybercrime and Cyber-Security Rule-Making: Mapping the Internal and External Dimensions of EU Security’ (2014) 1 EJRR 46. It is a complex subject area perceived to exist somewhere between a policy area and subject field, one which has been mainstreamed in the latest Treaty reforms: see Carrapiço and Trauner, *ibid*.

<sup>57</sup> For example, Martin Trybus and Nigel White (eds), *European Security Law* (OUP 2007), Panos Koutrakos, ‘The European Union in the Global Security Architecture,’ in Van Vooren, Blockmans and Wouters (eds) (n 36).

<sup>58</sup> See Christian Kaunert and Kamil Zwolski, *The EU as a Global Security Actor – a comprehensive analysis beyond CFSP and JHA* (Palgrave Macmillan 2013).

approach here is instead bottom-up.<sup>59</sup> The casestudies employ a textual ‘tracing’ methodology which explicitly develops their internal and external dimension, developed in detail internally. As a result, this book develops a methodology which is transparent and explicit to capture the processes depicted.

## V. The Aims of the Text

### i. *Understanding the EU as a postnational actor*

This leads to the broader question as to what is meant to pinpoint the global reach and effects of EU law or to delineate patterns and tendencies as a phenomenon. The role of the EU as an organisation and more personified, as a unique legal actor, entails than understandings of the spread of legal rules has a context that is not only a process or a tendency. Understanding how the EU intends, aims and formulates the effects of its rules globally is both a descriptive and normative project which has considerable ramifications for the constitutional fabric of the EU as a project. This aspect of the study of the global reach and effects of EU law is conducted here in two ways. The first is more discrete and considers the place of the EU as an actor within postnational rule-making. The conceptualisation of ‘actors’ engaging in rule-making is central to theorising power, autonomy, influence and even legitimacy in rule-making. However, there is no consensus in scholarship on what it means to be an actor, despite its centrality to discussions on rule-making, power and influence.<sup>60</sup> To view an institution as an actor in their own right is technically an inaccurate one.<sup>61</sup> Legal scholarship employs formal, limiting criteria to assess what we may frame here loosely as ‘actorship’ qualities, such as legal personality, legal authority to act and institutional autonomy.<sup>62</sup> Yet such formalism may pose many limitations. Even if it is able to collect a Nobel Peace Prize, have its own diplomatic Service or have nearly every EU executive actor and agency endowed with a global mandate,<sup>63</sup> the EU does not function as a unitary actor in the world. It does not participate as a State in the global legal order. Although it has ‘single legal personality’, ie formal authority to act, the EU has a broad range of ‘statuses’ in international organizations.<sup>64</sup> Sometimes it acts alongside its Member States, sometimes it does not. It faces the reality that International Agreements cannot be easily renegotiated. These challenges are not limited to the EU in the outside world. Internally, the EU is comprised of very powerful institutional components that sometimes appear more powerful than the sum of its parts. They are broadly understood as actors engaged in rule-making after the State.

Yet doctrinal or formalist understandings of ‘actors’ engaged in rule-making are unable to capture new manifestations of ‘executive’ actors widely found in the EU or its powerful and independent judicial components or its transnational parliament.<sup>65</sup> There is a paradox as to the state of the EU: it is

<sup>59</sup> Contrast Peer Zumbansen, ‘Administrative Law’s Global Dream: Navigating Regulatory Spaces Between ‘National’ and ‘International’ (2013) 11(2) I.CON 506.

<sup>60</sup> See Elaine Fahey, *The Actors of Postnational Rule-Making: Contemporary Challenges of European and Public International Law* (Routledge 2015), Introduction; Christopher Hill, ‘The Capability-Expectations Gap, or Conceptualizing Europe’s International Role’ (1993) 31(3) *Journal of Common Market Studies* 305; Joe Jupille and James Caparaso, ‘States, Agency and Rules: the European Union in Global Environmental Politics’, in Carolyn Rhodes (ed), *The European Union in the World Community*, (Lynne Rienner 1998), 213.

<sup>61</sup> See Michael Barnett and Martha Finnemore, *Rules for the World International Organizations in Global Politics* (Cornell University Press 2004).

<sup>62</sup> See for example, Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2005); Richard Collins and Nigel White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011); Jan Klabbers, ‘Presumptive Personality: the European Union in International Law’, in Marti Koskenniemi (ed) *International Law Aspects of the European Union*, (Martijunus Nijhoff, 1998) 231; Andrea Bianchi (ed), ‘Relativizing the Subjects or Subjectivizing the Actors? That is the Question’ in Andrea Bianchi (ed), *Non-State-Actors and International Law* (Ashgate 2009).

<sup>63</sup> Deirdre Curtin, ‘Challenging Executive Dominance in European Democracy’ (2014) 77(1) MLR 1.

<sup>64</sup> Piet Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011); Mathias Ruffert ‘Personality under EU-Law: A Conceptual Answer towards the Pluralisation of the EU’ (2014) 21 ELJ 346.

<sup>65</sup> On the Executive: Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (OUP 2009); On courts: Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2013); Elaine Fahey, ‘The EU Emission Trading Scheme and the Court of Justice: the High Politics of the indirect promotion of global standards’ (2012) GLJ 1247, R. Dan Kelemen, *The Transformation of Law and Regulation in the European Union* (Harvard University Press 2012), On transnational

an empowered, sophisticated legal actor. Yet it faces as many external and internal hurdles in its development as what is argued here later to be its embryonic sovereignty evident in the global reach and effects of EU law. The contemporary formulation of the global reach and effects of EU law does not grapple with the inconsistencies, incoherence and challenges of EU action in the world, by articulating the complexities of ‘actor’ related questions. Nevertheless, as the casestudies pursued in Chapter 5 and 6 on data transfer and cybercrime and security will demonstrate, the tensions between the internal and external in EU law often flow from the *autonomy* exercised by its actor components. This results from the ‘bicephal’ stance of the EU in theory and practice. It is argued here to be excusatory and indulgent of the overreach of EU powers, as exemplified in accounts of the global reach and effects of EU law. Behavioural understandings of EU action dominate EU law and governance scholarship, e.g. observing its practices, assessing its action and locating its place in a broader global context. In this regard, a closer focus upon how we understand and depict actors in rule-making develops has resonance with this scholarship.

## ii. *Understanding postnational sovereignty*

The second aspect of the study is conducted through sovereignty, often considered as the core ideal of public law and elementary tenant of power, constitutionalism and authority.<sup>66</sup> Accounts which depict or describe postnational rule-making processes, constitutionalism or democracy do not tend to invoke sovereignty, neither as a construct nor as a method or process. Instead, such accounts are more concerned with the place within breakdowns of orthodoxy conceived broadly, the shortcomings of postnational democracy and its institutional components and rule-making practices. Sovereignty receives little or no attention in the post-Lisbon context, even after considerable structural, constitutional and policy changes to the EU itself.<sup>67</sup> Sovereignty is arguably neither popular nor conventional nor does it transpose itself into discourses of rule-making beyond the Nation State. For some, to speak of sovereignty in the context of global governance leads to the bewildering identification processing of identifying a ‘global sovereign’.<sup>68</sup> It has been argued here that those who argue that new and evolving international institutions do not necessitate a new conceptualisation of sovereignty are unduly myopic to the challenge of postnational rule-making. EU scholarship on sovereignty begins from the premise of its exceptionalism. However, much scholarship on sovereignty and the EU has been developed prior to more recent invocations in the EU treaties to evolve as a postnational democracy.

The casestudies of AFSJ norm promotion, transatlantic data transfer and cybercrime and cybersecurity are argued to demonstrate significant internal and external incoherence between the aims and means of EU rule-making. They generate major challenges as to coherence, competence and boundaries. It is argued that there is a need to engage with the blurring of sovereignty, authority and territory within these developments. However, as a broader proposition, the space of EU rules is argued here to require more nuancing, method and case studies as to its components. The book argues

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parliaments: Davor Jancic, ‘Interactions between the EU and US legal order’ in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law* (CUP 2014); Neil Walker, ‘Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms’ (2012) 3 TLT 61.

<sup>66</sup> Bert Van Roermund, ‘Sovereignty: Unpopular and Popular,’ in Neil Walker (ed), *Sovereignty in Transition: Essays in European Law*, (Hart 2003) 33.

<sup>67</sup> See further chapter 7 Jean Cohen, *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism* (CUP 2012); Beth Simmons, ‘Review Essay: Is Sovereignty still Relevant’ (2000) 94(1) AJIL 226.; Hans Lindahl, ‘Why Sovereignty?’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and Law: Domestic, Regional & Global Perspectives* (OUP 2013); Steven Krasner, *Sovereignty. Organised Hypocrisy* (Princeton University Press 1999); Wouter Werner and Marc de Wilde, ‘The Endurance of Sovereignty’ (2001) 7 *European Journal of International Law* 283; Neil Walker, ‘The Cosmopolitan Local: Neil Mac Cormick’s Post Sovereign World’ in Jon Fossum and Augustin Mendez (eds), *The Post-Sovereign Constellation* (Springer 2011).

<sup>68</sup> See Ch. 7.

overall that the merger of sovereignty, territoriality and jurisdiction in a global world is an emerging matter for EU law.

## VI. On Methodology: Tracing EU Norm Promotion

This account considers how the EU actually promotes norms in its rule-making, i.e. to consider its actual practices as to its values, instruments and rules deployed so as to cause or generate rule-transfer. As a result, a specific methodology used here to capture these phenomena is to focus upon the values, instruments and rules, broadly defined, which the EU actually adopts in its rule-making. The formulation of ‘life cycles of norms’ as developed by Finnemore and Skikink (‘norm emergence’, ‘norm cascade’ and ‘norm internalisation’) have proven to have had a significant impact upon the study of international politics.<sup>69</sup> The increasing use of this rubric by *legal* scholars, exploring the similarity between norms and law in the domestic and international context is drawn from and further developed here.<sup>70</sup> It is argued here that at the heart of understanding EU rule-transfer lies the fact that International organisations such as the EU often act as norm agents or entrepreneurs but do not do so with a sufficiently transparent method.<sup>71</sup> Norms act as a focal point for decentralised networks of organisations and individuals and as a result, international organisations may act as major promoters of norms in world politics.

Law performs an important communicative function in the EU legal order.<sup>72</sup> However, as Sunstein states, law is not an agent and cannot speak, lacking personality or personification and law is a complex construct for the visualisation of rule-making. Rather, law can make statements and so the expressive function of law and its impact upon prevailing social norms is part of the structures of our society.<sup>73</sup> The EU usually communicates its norms *externally*, such as the rule of law or the promotion of fundamental rights, in clauses of the formal Agreements with neighbouring countries, candidate countries and trade partners.<sup>74</sup> Alternatively, the EU issues local statements: for example, in Gaza recently the EU expressed its views on the death penalty in a public statement.<sup>75</sup> More usually though, the enunciation of EU norms is usually communicated to the subjects and objects of the Agreement with legal authority, i.e. by formal and consensual agreement with a third party. However, the EU has a patchy record as regards the enforcements of these norms. For example, it rarely enforces its suspension rights for breach thereof in the context of trade.<sup>76</sup> Moreover, the EU maintains a ‘transparent’ Treaty register, where it formally categorises the types of norms that it promotes in its external relations.<sup>77</sup> However, there are many shortcomings to these practices, substantive (e.g. what it communicates overall) and how it does this (e.g. transparently) considered next, that impact upon the

<sup>69</sup> Martha Finnemore and Katherine Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisation* 887. See further references in Ch. 4.

<sup>70</sup> See further in Ch. 4.

<sup>71</sup> Finnemore and Sikkink, (n 69).

<sup>72</sup> Albeit without defining what law is: Cass Sunstein, ‘On the Expressive Function of Law’ (1995) 144 *University of Pennsylvania LR* 2021, 2024; Cass Sunstein, ‘Social norms and Social Roles’ (1996) 96 *Columbia LR* 903. But see Matthew Adler, ‘Expressive Theories of Law: A Skeptical Overview’ (2000) 148 *University of Pennsylvania LR* 1363.

<sup>73</sup> For example, it might be contested whether the EU’s ‘advocacy’ before the US Supreme Court could be considered as law nor whether legislation alone is captured by Sunstein, hence the adoption of rule-making here: Elaine Fahey, ‘On The Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US’ (2014) 20(3) *ELJ* 368.

<sup>74</sup> For example, European Commission, Inventory of Agreements containing the Human Rights Clause, DG RELEX/B2 – Treaties Office, 7 July 2011; Available at <<http://ec.europa.eu/world/agreements/viewCollection.do>> accessed 23 December 2015.

<sup>75</sup> For a list of locally-issued EU views on the death penalty, see the website of the European External Action Service <[http://eeas.europa.eu/human\\_rights/adp/index\\_en.htm](http://eeas.europa.eu/human_rights/adp/index_en.htm)> accessed 23 December 2015.

<sup>76</sup> For example unilateral EU suspension of treaties has occurred in relation to countries such as Zimbabwe, Liberia, Togo, Fiji, Guinea and Mauritania. The EU has also invoked trade sanctions for human rights violations without a human rights clause strictly providing for it in the case of Myanmar: Bruno De Witte, ‘The EU and International Legal Order: the case of Human Rights’ in Malcolm Evans and Panos Koutrakos (eds), *Beyond The Established Legal Orders. Policy Interconnections Between The EU And The Rest Of The World* (Hart 2011) 481; Laurent Pech, ‘The Rule of Law as a Guiding Principle of EU’s External Action’ *CLEER Working Paper* 2012/3.

<sup>77</sup> See (n 33).

manner in which we may understand the methodology of EU rule-transfer.

As a general proposition, there are a variety of subject matters through which to consider the concept of EU norm promotion through law, either internally or externally. The theme of exportation of EU values has a very broad interpretation and considerable span of subject areas, beyond security.<sup>78</sup> The EU frequently imports values and norms and itself acts often as a model for values through its rule-making, on account of the success, novelty and effectiveness of its rules.<sup>79</sup> By contrast, internal rule-making processes may generate differing practices and processes as to norm promotion. The dominant focus of much scholarship upon the actors of norm promotion as norm agents has given centre-stage to newly empowered actors in evolving policy:- for example, to the European Parliament in the Area of Freedom, Security and Justice (AFSJ).<sup>80</sup> Such a focus appears useful in specific policy fields but may be less useful in a broader theorisation of EU action and the boundaries thereof in rule-making. It may also fail to capture the nuances of post-national rule-making, especially as regards the evolving external dimension to EU action.

This book argues that we must look beyond the prism of ‘norm internalisation’ in studying rule-making, commonly deployed in IR and social sciences literature, whereby the internal adoption of norms from external sources is a specific focus.<sup>81</sup> Similarly, judicially-focussed accounts of norm internalisation by legal scholars do not offer holistic, i.e. a complete and unified account of multi-directional rule-making processes. Instead, this book argues that a holistic account is achieved through a study of rule-making processes ‘bottom-up’. Norm internalisation lacks a focus upon the methodology of rule-making processes and does not focus upon rule-based content usually. It may be argued to presuppose a process, for example, the internationalisation of European law, which may not sit well with nuances of contemporary EU rule-making. For example, IR scholarship has focussed upon the EU’s internationalisation of US norms in post 9/11 rule-making. However, it excludes rule-making practices such as the subsequent adoption by the EU rule-making adopted initially with the US bilaterally.<sup>82</sup> It is a narrative of post 9/11 security that perhaps is insufficiently nuanced to contemporary rule-making in security and is explored here in Chapter 5.

A brief outline of the chapters of the book are sketched here next.

### Outline of the book chapters

*Ch. 2* (**‘The Boundaries of the Global Reach of EU law’**) examines the phenomenon and formulation of the global reach of EU law. *Ch.2* considers the nature of competence as a construct in EU law and reflects upon the fluidity of the boundaries of the ‘internal’ and ‘external’ giving rise to the global reach of EU law and their nexus. The chapter then examines three distinct and discreet meanings of the global reach of EU law: the externalisation of the internal market, extra-territoriality of EU law and the global reach of the EU in international organisations. It assesses in each section their place in judicial review before the Court of Justice in certain recent proceedings. It argues that the global reach of EU law as it evolves may cause its formal and even social legitimacy much

<sup>78</sup> See also Sonia Lucarelli and Ian Manners (eds), *Values and Principles in EU Foreign Policy* (Routledge 2006).

<sup>79</sup> Marise Cremona, ‘Values in EU Foreign Policy’ in see Evans and Koutrakos (n 23), 275, 285. The European Convention on Human Rights or the Geneva Convention on the status of refugees are examples of the former, the evolution of the legal order of ASEAN might represent the latter. See also Marise Cremona, ‘The European as a global actor: Roles, models and identity’ (2004) 41 CMLR 553.

<sup>80</sup> Ariadna Ripoll Servent and Alex MacKenzie, ‘The European Parliament as a ‘Norm Taker’? EU-US Relations after the SWIFT Agreement’ (2012) 17 EFAR 71.

<sup>81</sup> See Ch. 4.

<sup>82</sup> Javier Argomaniz, ‘The Passenger Name Records agreement and the European Union Internalisation of US Border Security norms’ (2009) 31 JEI 119.

‘slippage’, exacerbated by few meaningful checks from the Court of Justice.

*Ch. 3 ('The EU as an Actor in Rule-Making')* explores how we conceptualize actors in rule-making. It argues that the EU as a legal and political actor in global governance seemingly defies categorization. Leading theorisations of EU action in the world are argued not to account for contemporary practices in EU law. The chapter examines initially descriptive issues such as, firstly, paradoxes and limitations of the EU as a legal actor in the world, followed by secondly, an analysis of the institutional components of organizations as actors. It considers thereafter practical limitations on how the EU acts in the world, i.e. how the EU ‘does’ to promote good global governance in the world and the relationship between EU law and Normative Power Europe (NPE). This chapter assesses in Section II the paradoxes and limitations involved in considering the EU as a unified legal actor in the world. Section III outlines the evolution of living institutional components and their place within the theory and practice of actors in rule-making. Section IV reflects on the dominance of Normative Power Europe as a means of understanding the normative dimension to EU action in the world, while Section V assesses pressures upon the ‘construct’ of actors in rule-making beyond the Nation State, from the perspective of organizations as structures, subject-matter and operationally.

*Ch. 4 ('AFSJ Directives in the post-Lisbon Legislative Cycle')* begins the overarching methodological study of the book and begins with the consideration of the casestudy of the EU’s place in international organizations that it promotes in rule-making, focusing upon external norms in internal rule-making. The chapter traces the output of one instrument of EU rule-making in a select field, namely its AFSJ. It considers how *external* norms, i.e. understood predominantly as instruments of international law, including but not limited to conventions, agreements, treaties, agreements qua norms, ‘cascade’ and ‘internalise’ into AFSJ rule-making in 17 proposed and adopted Directives in the post-Treaty of Lisbon, i.e. in the 2009-2014 legislative cycle. It considers (i) norm promotion practices, (ii) legislative self-characterisation and (iii) the formulation of ‘norm cascade’ into EU law. The chapters examines the primacy of external norms as an overall process.

*Ch. 5 ('Tracing Transatlantic Rule-Transfer: Data Transfer')* explores rule-transfer by an examination of select areas of transatlantic relations, namely EU-US PNR and EU-US TFTP and their effects upon EU security rules. It explores select areas of transatlantic imprints on EU security rules, examining the operation of rule-transfer in Part I and considers the question of importation and exportation of values via EU law as well, as the context of mutual recognition in transatlantic security agreements. An analysis of two transatlantic agreements and their impact upon and link to internal EU security rules is set out in Part II. Part III considers the mooted ‘global approach’ of the EU to PNR. The chapter shows how the stringency of the measures arising as transatlantic legal imprints should be of some concern in the absence of a clear understanding of the adequacy of operation and safeguards of transatlantic rule-making. Moreover, the origins of the EU internal security rules remains of significance for understanding how the resulting rules themselves should be reviewed. The exercise of tracing transatlantic rule-transfer provides an insight with which to view the global reach and effects of EU law. It demonstrates the precariousness of the internal and external, which the EU readily exploits.

*Ch. 6 ('The EU’s Cybercrime and cyber-security rule-making')* conducts a casestudy of the relationship between internal and external security policies of the EU in EU rule-making in the area of cybercrime and cybersecurity. It explores how the EU gives primacy to external norms, i.e. the Council of Europe Convention, in both its contemporary internal and external rule-making in in the casestudy, it appears to produce very different regulatory results despite the commonality of the

norms used. Section I examines the evolution of the instruments of the EU's internal regulation of Cyber Security and Cybercrime in the EU Cyber Strategy, its supporting Directive along with the development of a Cybercrime Directive. Section II examines the formulation of risk therein, while Section III contrasts rule-making between the EU and US in cybercrime and cyber security and its relationship to internal EU rule-making. The traditionally asserted 'fluidity' of external and internal security is argued to be inaccurate when considered from this perspective.

*Ch. 7 ('The EU's Participation in the Global Legal Order: Manifestations of Sovereignty')* draws together the strands of the casestudies and text and considers the global reach and effects of EU law as manifestations of sovereignty. This chapter argues that postnational rule-making practices conducted by the EU may usefully be captured by sovereignty, as an over-arching framework. Much scholarship on sovereignty and the EU has been developed prior to more recent invocations in the EU treaties to evolve as a postnational democracy. Participation by the EU in the global legal order requires reflection on what the EU is and what it does. Section II assesses the understandings and many paradoxes of sovereignty. Section III considers the exceptionalism of EU sovereignty, including EU sovereignty, as developed by Walker. Section IV considers what the EU participates towards the global legal orders and how it does this, in four sub-sections, as to its (1) goals, (2) its social practices, (3) the 'space' of and for EU rules, and (4) the construction of (trans)boundaries under EU law.

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