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From opt-in to obligation? Examining the regulation of globally operating tech companies through alternative regulatory instruments from a material and territorial viewpoint

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ABSTRACT

Modern society's ever-increasing reliance on technology raises complex legal challenges. In the search for an efficient and effective regulatory response, more and more authorities – in particular the European Union – are relying on alternative regulatory instruments (ARIs) when engaging big tech companies. Materially, this is a natural fit: the tech industry is a complex and rapidly-evolving sector and – unlike the rigid classic legislative process – ARIs allow for meaningful *ex ante* anticipatory constructions and *ex post* enforcement due to their unique flexibility. However, from a territorial point of view several complications arise. Although the use of codes of conduct to regulate transnational private actors has a rich history, the way in which such codes are set out under articles 40 and 41 of the EU's GDPR implies a 'hardening' of these soft law instruments that has repercussions for their relationship to the principles of territorial jurisdiction. This contribution serves as a first step for further research into the relationship between codes of conduct, the regulation of the tech industry and the territorial aspects related thereto.

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1. Introduction

The services offered by tech companies such as Google, Amazon and Apple have become inseparable from modern life, be it for professional or personal use. However, the rapid rise of these tech and data-driven corporations as powerful economic actors operating on a global stage has created serious legal challenges, such as questions on how (and whether) to deal with online hate speech (Faiola 2016), massive data breaches (Cadwalladr and Graham-Harrison 2018) and deceptive data collection practices.[1] Although similar controversies have existed for some time now, the massive scope of these recent scandals has caused national legislators to fully realise that the information and communication technology (ICT) sector might require a rethinking of how regulation is approached.

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After all, materially speaking, the ICT industry offers a fast-evolving and highly technical environment that challenges the ability of the law-making process to keep up with rapidly evolving technologies (pacing problem) (Cave, Marsden, and Simmons 2008), tests the knowledge possessed by regulators to make informed decisions on extremely complex or technical matters (knowledge problem) (Gervais 2010) and showcases the potentially negative repercussions that a rigid regulatory environment can have on innovation (instrument failure) (Black 2002).

Territorially speaking, the tech industry offers another challenge that is perhaps even more daunting: political jurisdictional boundaries no longer succeed in containing these immaterial and essentially borderless services, resulting in a sort of 'deterritorialization' (Barkan 2013, 87) that allows tech actors to shape to a large degree the debate on which norms they should be subjected to (Kilovaty 2019; Peng 2018). This leads to national authorities facing jurisdictional issues when seeking to regulate or enforce rules.

Against this background, it is crucial to note that the rise of the 'new governance' philosophy (de Búrca and Scott 2006) and the prospect of 'smart regulation' (Gunningham and Rees 1997; Gunningham and Sinclair 2017) has resulted in more and more state authorities involving a broader scope of actors (such as private enterprises, NGOs and interest groups) in the regulatory process, in what some scholars have dubbed 'the twilight of the traditional regulatory system' (de Búrca and Scott 2006; Hagemann, Skees, and Thierer 2019; Sabel and Zeitlin 2012). The terms 'self-regulation' and 'co-regulation' are often used to describe such regulation that deviates from traditional legislation, with the former indicating the creation and implementation of rules by a group of actors – industry in particular – with minimal or no intervention by the state (Bartle and Vass 2005, 19; Lievens 2010). The latter, on the other hand, describes constructions that link non-state regulatory systems to state regulation (Hans Bredow Institute 2006) by relying on private entities to perform a variety of government functions, with state authorities providing oversight and enforcement (Rubinstein 2010).

Nonetheless, as scholars continued studying the dimensions of governance-beyond-government, it emerged that these terms are too rudimentary to adequately capture the complex interrelationships between state and non-state actors that exist in nearly every policy domain. Instead, to more accurately convey the many possible actor configurations, we will speak of 'decentered or polycentric regulatory regimes' (Black 2008). This is used in conjunction with the term 'alternative regulatory instruments' (ARIs) to refer to the regulatory output of such regimes that cannot be classified as traditional legislation. After all, regulatory scholars have concluded that regulation operates on a continuum according to the degree of involvement by the myriad of actors that can be active in a given domain (Lievens 2010; Prosser 2008, 101).

By making the conceptual choice for ARIs instead of 'self-regulation' and 'co-regulation', we recognise on the one hand the impossibility of comprehensively classifying the extremely broad range of tools that allow for the decentralisation of regulatory authority among public, private and public-private actors and institutions (i.e. a positive definition of the broad range of forms in which regulatory instruments other than traditional legislation can manifest themselves) (Abbott 2013; Lievens 2011, 171) while on the other hand denoting the status of such tools as any instrument that offers an 'alternative' to traditional top-down command-and-control state-issued legislation (i.e. a negative definition of what ARIs are not) (Figure 1).[2]

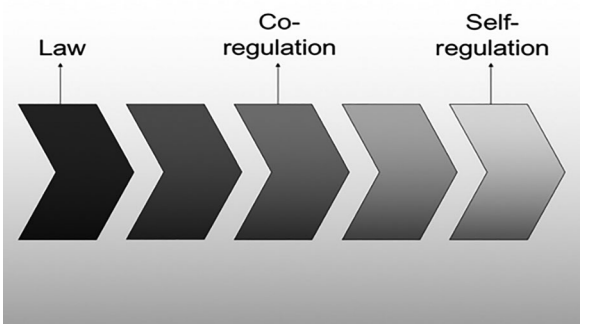

Figure 1. The regulatory continuum (Lievens 2010, 229).

The use of ARIs has specifically been promoted at the level of the European Union, forming one of the pillars of the European Commission's policy agenda (European Commission 2001) and appearing in a wide range of documents, such as the 2003 and 2016 Interinstitutional agreements on better lawmaking, the Better Regulation Guidelines (European Commission 2017c) and its accompanying toolbox (European Commission 2017b). This has led to the EU explicitly integrating stakeholder participation in legislative instruments. A major example thereof is the European Union's 2016 General Data Protection Regulation (GDPR) which modernises the EU's previous personal data protection framework established in the 1995 Data Protection Directive (DPD). Although the DPD already pioneered the use of ARIs by promoting codes of conduct in its article 27, the GDPR expands upon that template by devoting two extensive articles on codes (articles 40 and 41 GDPR).[3] The GDPR explicitly states that codes are 'intended to contribute to proper application' of the GDPR by specifying the concrete application of a non-exhaustive list of data protection principles and topics. It is therefore clear that the European legislator considers ARIs – and codes of conduct in particular – important tools to implement the personal data protection standards set out in the main provisions of the GDPR.

This contribution will find that the increasing use of ARIs should be encouraged from a material point of view due to their unique characteristics that make them well-suited to the technical complexity and rapid changes offered by an industry reliant on innovation and emerging technologies (Section 2). However, from a territorial point of view it will argue that, while codes of conduct have traditionally been the instrument of choice to regulate transnational corporations (TNCs), a 'hardening' of this soft law instrument is taking place under the GDPR that complicates their jurisdictional characteristics (Section 3). The conclusion briefly elaborates on the possible repercussions thereof, both within the EU and beyond its borders.

2. Complex, rapidly-evolving industries and ARIs: a natural fit

It has been mentioned above that the use of traditional legislation to regulate a sector as technically complex and rapidly-evolving as the tech industry is inevitably confronted with the pacing and knowledge problems and concerns regarding instrument failure, but it deserves to be elucidated that these are not isolated issues; they are interrelated and reinforce each other. For example, scholars note that the traditional legislative process

might never be able to keep up with the speed of today's innovation (Ranchordás 2015; Stylianou 2011). This not only exacerbates the aforementioned knowledge problem (Cohen 2016, 397)[4] but both problems also mutually reinforce each other. The legislation that is produced as a result may cause high opportunity costs (Ellig and McLaughlin 2012; Huber 1983, 1027) as well as compliance costs that potentially scare off existing actors and demoralise new market entrants (Brill 2011, 18; Mândrescu 2017).

This is not to paint a completely bleak picture of traditional legislation. In fact, top-down regulation has many unique strengths: it is perceived as predictable and binding (Commission of the European Communities 2001), it possesses democratic legitimacy due to its origins in elected legislative organisms (Prosser 2008) and an extensive and established apparatus provides for the enforcement of rules. Nonetheless, the difficulty of traditional legislation to foresee in rules that are both *ex ante* sufficiently protective of consumers and dynamic enough to allow industry innovation, render it a sub-optimal tool to regulate the rapid and unpredictable evolutions of the tech industry.

For this reason, the use of ARIs to consciously utilise the variety of actors in polycentric regulatory environments is an advantageous way forward. From a material point of view, such multi-stakeholder involvement not only helps manage the complexity of multi-actor interactions in the regulatory process but also takes advantage of their diversity in knowledge and resources (Marsden et al. 2013, 20). This can lead to a higher degree of expertise when drafting rules (Bonnici 2008; De Haan 2013; McLaughlin 2013) as well as lower regulatory costs due to a more streamlined institutional environment compared to the more rigid, diffuse and time-consuming legislative process. Since ARIs are not the product of strict government-based procedures and structures (Hagemann, Skees, and Thierer 2019, 5) but instead decentralise 'regulatory authority among public, private and public-private actors and institutions … [they] can be adopted and revised more rapidly than formal regulations' (Abbott 2013, 6).

Ex ante, this opens up the important possibility of taking informed anticipatory action to address emerging issues and present user-focused solutions, while still offering a nimble ruleset that can address unexpected evolutions, is tailored to the needs of the sector in question, and avoids the unnecessary stifling of innovation (Armitage, Cordova, and Siegel 2017). *Ex post*, from the perspective of compliance, the use of ARIs can also correct the situation under traditional legislation whereby enforcement authorities choose to ignore or operate beyond rules that they feel are outdated or inflexible (Hagemann, Skees, and Thierer 2019, 35). Instead, when designing and monitoring an ARI through a multi-stakeholder process, these authorities have a place at the negotiation table where they can at any time – including after the implementation of the rules – suggest changes to the instrument, allowing enforcement mechanisms to quickly adapt to an evolving situation. As advanced by Ayres and Braithwaite, such multi-stakeholder processes lead to more balanced and durable regulation while also providing public accountability (Ayres and Braithwaite 1995). Additionally, the focus that ARIs place on relationship building, the gathering and exchanging of information, agenda setting, brainstorming and consensus building, offers the possibility to change adversarial relations into cooperative ones (Marsden et al. 2013; Susskind et al. 2003), thereby easing the tensions between public policy goals and corporate interests (Kobrin 1977). Finally, the creation of a monitoring body with strong investigative and sanctioning powers has the potential to offer stakeholders and consumers an effective compliant mechanism that functions

faster than traditional courts, while simultaneously unburdening those courts from such specific complaints (SCOPE Europe 2019).

Nonetheless, a high degree of involvement by non-state actors coupled to a low degree of involvement by state actors (i.e. a regime that veers towards the right side of the continuum) can be perceived as democratically deficient due to the more limited transparency and accountability compared to top-down legislation (Latzer et al. 2013; Rubinstein 2018). There is also the risk of 'regulatory bias', i.e. that only aspects are regulated that are advantageous to the industry actors themselves (Segal 2001). Finally, weak oversight and enforcement might lead to 'free riders': actors who violate the rules go unpunished due to a lack of enforcement, while actors who fully comply suffer market disadvantages due to said compliance (Campbell 1999).

If both state and non-state actors are involved to a large degree in a regulatory construction (i.e. a regime that looks for the middle ground on the continuum), the advantages of self-regulatory systems and top-down systems are potentially combined. The former provides a flexible and adaptable framework that is built on the expertise and involvement of interest groups and enterprises, while the latter adds more legal certainty and democratic legitimacy (Schulz and Held 2004). Furthermore, the opportunity for private actors to negotiate about rules is said to lead to increased compliance rates due to a sense of ownership over the rulemaking process (Rubinstein 2010) while a government safety net in case of non-compliance remains present at all times (Csink and Mayer 2014, 406). However, since such a combination potentially creates and/or maintains both an industry-based ecosystem and a governmental regulatory system side-by-side, there could essentially be a duplication of the institutional environment (Palzer and Scheuer 2002, 7). This creates an increase in systemic costs (Palzer and Scheuer 2002) and the opacity of such a system can reduce consumer confidence (Segal 2001), complicate oversight and potentially lead to abuse of the system.[5] Care must be taken to avoid an accumulated volume of rules that becomes overly large or complex (Mitchell 2017), which not only leads to an increasingly less rational and flexible mass (Rauch 1999, 152) but also provides an opportunity for industry leaders to shield themselves from new market players (Taylor 2016). This also opens the door to the opposite situation of the 'knowledge problem'; instead of a lack of knowledge on the part of the policymakers, the output of highly specialised multi-stakeholder groups in technical sectors might be incomprehensible to outsiders. This could be called the 'specialist problem', if you will, and it risks that experts in a field become so entrenched in their position that they actively seek to protect their status by resisting a simplification of complex rules (Olson 1982).

Additionally, ARIs are not always perceived as offering the same high level of legal certainty that top-down legislation does (Stern 2016, 181) since they can be rapidly adapted, may feature complex interdependencies between actors and generally lack a central authority (Black 2008, 140). This reveals the paradox of hard law: although slow and cumbersome procedures are unfit to regulate rapidly-evolving emerging technology markets, rigid rules are welcomed by investors as a way to achieve predictable outcomes and engage in risk mitigation (Knight 2016). To truly prove their strength over traditional legislation, ARIs should therefore build in strong enforcement mechanisms that dispel all doubts as to their capacity to legally challenge scenarios where an actor feels that they have suffered damages through a violation of the rules. This will also fortify the perceived legitimacy of ARIs, since it can be argued that legitimacy is

not only gained by process, but equally by whether or not violations are dealt with (Weiser 2017). Questions surrounding territorial legitimacy are a different matter; they will be treated under Section 3 (see below).

ARIs also face the 'democratic challenge' which Black describes as questions such as who should be involved in decision-making structures and how accountability should be guaranteed (Black 2008, 141). In this regard, constructive technology assessments (CTAs) offer a way forward. This assessment technique seeks to achieve a more reflexive co-evolution of technology and society by bridging the separation between the development of a technology and societal uptake and use (Rip 2002, 2018). This is not merely done through anticipation – for example by taking into account path dependency theory – but also through a process of feedback and learning by way of workshops that gather both the developers of the technology in question and a variety of actors that are external to its development (Schot and Rip 1997). Such an anticipatory approach involving 'outsiders' not only increases the societal legitimacy of new technologies, but can also help avoid risks or consequences that the developers of the technology would not foresee themselves due to their position within an 'enactment frame' that steers the perception that society poses a 'challenge' that the technology in question must overcome (Garud and Ahlstrom 1997). The recent surge of interest in the societal effects of algorithmic decision-making has revived scholarly work surrounding this topic and can serve as inspiration for policymakers as they further consider and implement ARIs (see, for example: Burk 2019; Green and Viljoen 2019).

In any event, the advantages that ARIs offer to govern rapidly-evolving and complex sectors when compared to traditional law-making are important. Their flexibility offers the possibility of effective *ex ante* and *ex post* strategies, while the involvement of a broad range of actors including civil society and industry will generally also lead to a higher quality of rulemaking that resists the short-sighted solutions that both traditional legislation or pure self-regulation might lead to. With regard to the *material* features of tech actors, the well-considered use of ARIs by policymakers can thus clearly offer important benefits.

3. ARIs and globally operating actors – the complex question of jurisdiction

Similar to the growing unease that top-down regulation is unable to adequately materially regulate tech companies, a parallel challenge has been noticeable for several decades now regarding the territorial challenges traditional legislation faces to effectively regulate corporate actors who conduct cross-border operations. This section will argue that challenges posed by transnational corporations are *in se* nothing new, but that the borderless nature of the internet accentuates the problem (3.1). Additionally, the EU's response thereto through codes of conduct might seem to create a successful jurisdictional regime at first glance, but in fact complicates the relationship between such instruments and their territorial features (3.2).

3.1 Transnational actors and territorial jurisdiction

To fully understand the territorial challenges posed by transnational corporations (TNCs) it is important to consider the historical background. After the decolonisation wave of the

1960s, the newly-independent developing self-titled Third World countries started being considered as both emerging markets and opportunities for production sites by mostly-Western companies. These large incumbents either commenced new operations or used mergers and acquisitions to form global structures (Willets 2001), thereby establishing a trend toward a transnationalised global political economy, a removal of trade barriers and the liberalisation of markets (Thiel and Maslanik 2010, 5). Already in 1975, this led to scholars such as Ball noting that 'the political boundaries of nation states are too narrow and constrictive to provide adequate scope for modern, large-scale economic activities' (Ball 1975). More recent literature in the field of governance notes that transnational decentred regulatory regimes are indeed characterised by an absence of a central locus of control and responsibility (Black 2008, 139–140). Since such regimes develop outside of both domestic law and international law systems (Stewart 2004), it is challenging to situate them within traditional legal and territorial jurisdictional boundaries (Skelcher 2005) and within traditional principal-agent relationships (Black 2008, 143). This results in an empowerment of non-state actors to exert influence on the global political economy to the detriment of state power (Strange 1996; Willets 2001), potentially allowing TNCs to escape from external scrutiny and possible sanctions (i.e. the concept of 'accountability') (Bovens 2007).

As a result of the far-reaching influence TNCs had on local economic and political situations, the Third World countries started considering their presence as detrimental to sovereignty and national development (Jenkins 2001, 2). After all, such companies gained massive revenue by quickly dominating a new marketplace, with the host country receiving little to no benefits. Realising that individual national measures would not meaningfully change the behaviour of corporate giants, the countries pressured intergovernmental organisations (IGOs) such as the Organisation for Economic Co-operation and Development (OECD) and the International Labor Organisation (ILO) to issue codes of conduct that stipulated the behaviour expected of these corporate actors, regardless of where they deployed their operations (International Labor Organisation 1977; Organisation for Economic Co-operation and Development 1976).

Although there is no universally accepted definition of what codes of conduct are – which is the case for most soft law instruments due to their fluidity[6] – we can construct a working definition based upon several elements common to scholarly work on the topic: codes of conduct aim to stipulate the desirability of a certain conduct by States, international or non-governmental organisations or private associations and persons (Friedrich 2010), with codes aimed at corporations specifically seeking to enhance the accountability of such actors in the (international) marketplace (Keller 2008, 4) by defining voluntary standards and principles to steer the behaviour of similar types of enterprises (i.e. a certain sector) (Organisation for Economic Co-operation and Development 1999; Robinson et al. 2009b).

Two facets of codes deserve further elucidation here. First, some scholars make a distinction between types of codes depending on the actor that designed them, with Beckers stating that 'private codes' are 'codes of conduct that have been developed by private actors' and 'public codes' are 'developed in the public (international organisations) … sphere' (Beckers 2018, 569, 573). We will employ this differentiation throughout the rest of the contribution. Second, since codes present vague, open norms that are non-binding but rather voluntary in nature, they must be differentiated from the precise and

binding rules that traditional hard law imposes. After all, as Abbott and Snidal argue, instruments become 'soft' from the moment that 'legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation' (Abbott and Snidal 2000, 422).

This recognition of codes of conduct as being soft law instruments has important territorial repercussions. The principle of state sovereignty that still forms the very foundation of the international legal order grants a state the right of exercising authority within a specific territory (Milanovic 2011, 8) with the logical consequence that states – even when working through international organisations – must respect the sovereign equality (Article 2(1) United Nations 1945) and independence of other states (United Nations 1946, 1947, 1949). However, since codes do not impose precise and binding norms, there is no overt threat to state sovereignty and equality, freeing them from the territorial confines that national legislative instruments must respect (Keller 2008, 5) and allowing them to construct a transnational normative regime that does not contradict the principles of public international law.[7] Therefore, although the effects of the 1970s codes designed by IGOs ultimately proved limited, they nonetheless achieved an important innovation in the regulation of private actors conducting cross-border operations.

However, modern corporate tech behemoths pose an even greater challenge to achieving effective transborder regulatory constructions since the products they offer are immaterial, essentially borderless and no longer rely on physical supply chains, instead operating through the decentralised and worldwide network that is the internet. Additionally, whereas many other policy issues with a global impact have treaties and international institutions acting as overseers in place (think of the WTO and its ruleset for trade) there are few global rules and no relevant international institutions where digital issues are concerned (Goodman 2020). Although many states seem to agree that there is a need to impose jurisdiction and global standards on tech companies, states have competing ideologies and interests that result in disagreement on what regulation should look like (Bradford 2007, 413–422). The failure of the United Nations Group of Governmental Experts in 2017 to deliver a unified view on internet governance is telling of how different viewpoints around the globe are. The WTO does not offer any solutions either since privacy falls outside of its ruleset and dispute settlement mechanism (Shaffer 2000, 50). Issues concerning tech actors consequently transcend the regulatory grasp of both national and international authorities: the former because of its territorial limitations, and the latter due to a lack of international consensus on possible solutions. The resulting international power vacuum has led tech companies to openly counter national governments (Eichensehr 2019) and determine to a significant extent for themselves the global tech norms they wish to obey (Kilovaty 2019; Peng 2018). This process of norm entrepreneurship caused Cohen to remark that 'dominant platforms' role in the international legal order increasingly resembles that of sovereign states' (Cohen 2017, 199). This theory slots in with the already existing accountability gap that exists where smaller hosts states are unable to enforce legal obligations on large multinational corporations whose turnover vastly overshadows their national budgets (Kamminga 2004, 425) – a fact that also holds true for tech companies.[8]

3.2 GDPR codes of conduct: a countermove that complicates codes' territorial features

Nonetheless, it can be observed that the EU attempts to counter these trends, chiefly through its renewed data protection framework the General Data Protection Regulation (GDPR). Article 3 of the Regulation significantly extends the territorial scope of the EU's data protection framework as compared to the 1995 Data Protection Directive (DPD), the legislative predecessor to the GDPR. According to the European Data Protection Board, this wider territorial scope is justifiable to ensure comprehensive protection of data subject rights in the EU as well as to provide a level playing field for companies that operate in EU markets (European Data Protection Board 2018, 4). Keeping this in mind, it is particularly interesting to turn towards articles 40 and 41 GDPR where the use of codes of conduct is encouraged 'to contribute to the proper application' of the GDPR by way of 'specifying the application of this Regulation' (article 40, paragraph 1 and 2 GDPR). Although codes were already featured in article 27 of the DPD, their implementation was considered lacklustre (European Commission 2010, 12; Robinson et al. 2009a, 9) on account of tensions between enterprises and authorities and the mandatory and slow nature of the procedures involved in the process (Korff 2002, 240; Robinson et al. 2009a, 39). Tellingly, in the more than twenty years that the DPD was in force, only two EU-wide codes of conduct were ever approved.[9]

The GDPR consciously tackles these issues in a number of ways, as will be made clear below. However, this contribution will argue that as a result of this push to 'do better', a 'juridification' of these codes (or, as authors have also called it, a 'hardening' (Traversa and Flamini 2015)) is taking place that has important repercussions for the relationship between codes and the principles of territorial jurisdiction. The term 'juridification' refers to 'the transformation within legalised governance arrangements from soft into hard law [meaning] that "softer" norms are changed to become part of the legal system by being subjected to the distinction within the legal system between legal and illegal' (Beckers 2018, 572). Such a 'hardening' of GDPR codes takes place along all three dimensions of law as identified and cited earlier by Abbott and Snidal.

First, there is the *dimension of obligation*. Codes are traditionally voluntary rulesets; they set out non-binding standards and principles (Keller 2008, 3–4; Robinson et al. 2009a, 8) and as a result it remains up to each individual enterprise in a sector whether or not it wishes to commit to the rules laid out in a code. However, the EU intimately intertwines the GDPR (a hard law instrument) and codes (a soft law instrument) by emphasising that codes are a means to demonstrate compliance with the hard law they are encapsulated in. This is strikingly demonstrated by article 83, 2 (j) GDPR which sets out that '[w]hen deciding whether to impose an administrative fine and deciding on the amount … due regard shall be given to … adherence to approved codes of conduct.' Although this technique is a response to the EU's previous finding that '[t]he absence of genuinely dissuasive and punitive sanctions' is a major weak point of codes (Working Party on the Protection of Individuals with regard to the Processing of Personal Data 1998, 4) and findings by authors such as Karns and Mingst that TNC regulation traditionally has been weak on account of the voluntary nature of such codes (Karns and Mingst 2010) such a repurposing of codes of conduct as a liability reduction mechanism to influence the amount or even the very imposition of fines *de facto* forces corporations to participate in them, since the enterprise

otherwise exposes itself to a higher risk of fines *or* a risk of higher fines. Companies will thus no longer participate in codes because they are formed in 'the shadow of the state' (Abbott, Marchant, and Corley 2012) and could potentially pre-empt binding legislation (Ascoly and Zeldenrust 1998, 45; Hirsch 2011, 460–464; Rubinstein 2018, 3) but rather because they are *directly* linked to punitive hard law provisions. The fact that compliance is thus presented as a condition to receive a legal benefit (Beckers 2018, 576) places a financial and punitive pressure on corporations that raises questions about whether or not the EU is overstepping its powers or violating the rights of business. More research is necessary to come to a conclusion on those points, but for the purpose of this contribution it should be clear that the non-binding dimension of codes of conduct has seen a drastic hardening by linking adherence to codes to the imposition and determination of hard law-based fines.

The *dimension of precision* also sees a marked hardening. Codes of conduct are traditionally carriers of 'open' norms, i.e. imprecise broad goals that offer corporations discretion in how to implement them (Michael 1996, 544). The opposite holds true for the GDPR's approach: it posits broad hard law provisions and determines that codes are meant to specify those provisions by offering prescriptive and specific solutions that can result in compliance. This is also evidenced by recital 98, which stipulates that codes of conduct should be used 'so as to facilitate the effective application of this Regulation … In particular, such codes of conduct could calibrate the obligations of controllers and processors'. Article 40 paragraph 2 is even more explicit, determining that codes may be created 'for the purpose of specifying the application of this Regulation' and subsequently offering a non-exhaustive list of topics and principles that are the subject of the GDPR's main provisions. In its guidelines on codes, the European Data Protection Board (EDPB) further states that codes should 'codify how the GDPR shall apply in a specific, practical and precise manner. The agreed standards and rules will need to be unambiguous, concrete, attainable and enforceable' (European Data Protection Board 2019a, 15). By embedding codes of conduct directly into hard law provisions and considering them a tool to specify its binding obligations, they are used contrary to their original goal as a means of expressing broad and open-ended intentions (Rubinstein 2018, 505). Once again, a hardening of codes of conduct can be perceived, this time along the dimension of precision.

Lastly, there is the *dimension of delegation*. As described by Abbott et al., this dimension entails that third parties are given authority to implement and enforce a rule, for example when administrative and judicial authorities interpret and extend broad principles (Abbott and Snidal 2000, 433; Abbott et al. 2000, 408). This is how hard law traditionally functions: an instrument sets out legal principles, which are then interpreted, implemented and enforced by a range of authorities. This stands in contrast to the typical reliance of codes of conduct on non-judicial monitoring mechanisms that offer advice or make non-binding decisions. This too changes under the GDPR. Firstly, the submission procedure that was optional for EU-wide codes under the text of the DPD has now been made obligatory by article 40 paragraph 7 for codes relating to processing activities in several Member States. A national authority must be chosen by the code owner, which then triggers the obligation for this authority to elect two co-reviewing supervisory authorities (SAs). Additionally, an approved draft must also await the opinion of the European Data Protection Board (the so-called 'consistency opinion') (European Data Protection

Board 2019b) before the national authority can decide whether or not approval is ultimately granted. Moreover, articles 64 and 65 set out the authoritative status of the Board's opinion, the need for the original SA to explain why they would diverge from the Board's opinion, and a dispute resolution procedure by the Board. The delegation techniques do not end there, since article 41, paragraph 2 provides stipulations on the procedures and structures that monitoring bodies must foresee in. Regarding codes on a national level, finally, paragraphs 5 through 9 of article 40 concern the role of the national supervisory authorities, who are tasked with the approval and registration of codes, possess the power to accredit monitoring bodies or revoke such accreditation, and decide on the suspension or exclusion of participants to a code (article 41 GDPR, paragraphs 3 through 5). The GDPR thus clearly engages in delegation, which diminishes the decentralised, non-governmental nature of codes of conduct and dilutes their cooperative character (Michael 1996, 541–542).

Such a 'hardening' of codes of conduct severely complicates the normally uncomplicated relationship that they enjoy with territoriality. After all, it is their characteristics of presenting open and voluntary norms that are not subjected to delegation to administrative and judicial authorities that allows them to set up a transnational normative regime that does not contradict the principles of public international law (Keller 2008, 5). As argued by writers such as Willets, a move towards the harmonisation of standards and joint policies from a desire to regulate markets 'does not represent the successful exercise of sovereignty over companies: it is the partial surrender of sovereignty to an intergovernmental body' (Willets 2001). This argument becomes all the more convincing when scholars' findings are taken into account that international organisations such as the EU 'undoubtedly exert a significant degree of influence over state governments, with a resulting "transnationalization" of domestic policies' (Thiel and Maslanik 2010, 15), expanding the notion of 'domestic policy' through regularised policy coordination by a variety of organisations in a multilevel governance system (Hurrelmann and DeBardeleben 2011). Moreover, the repercussions may be felt beyond the borders of the EU, a fact acknowledged by the EDPB itself in its guidelines on codes of conduct where it states that codes may have an impact on 'the level of protection which the GDPR provides to the wider international community' (European Data Protection Board 2019a, 10). In a globalised and interconnected world, it is indeed nearly inevitable that a variety of state and non-state actors beyond the territorial jurisdiction of the EU will be impacted to some degree by codes of conduct.

4. Conclusion

From a territorial point of view, this contribution has focussed extensively on codes of conduct since this particular soft law instrument is traditionally chosen to regulate transnational corporations on account of their ability to construe transnational normative regimes that do not violate the principles of public international law. However, there are indications that the GDPR's approach to codes results in a 'hardening' of these soft law tools among the dimensions of precision, obligation and delegation. The repercussions of such an evolution are two-pronged. First, there is the argument put forward by authors such as Willets cited above that it results in a diminishing of EU member states' sovereignty to the benefit of the EU. Although this paper does not render judgment on this being a positive or negative development, it is certainly a reality that should be

taken into account. Indeed, research at the turn of millennium already concluded that the EU often lets political non-binding instruments gradually acquire legal connotations to attain more influence (Alter 2000).

Second, whereas the use of codes to set up transnational normative regimes is in compliance with the principles of international law due to their 'soft' characteristics, hardened codes would imply that the EU sets up a binding transnational regulatory regime beyond its territorial jurisdiction. On one hand, we could justify this by referring to the 'Brussels effect': the EU's market power and institutional characteristics enable it to engage in unilateral regulatory globalisation, i.e. the ability to 'externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards' (Bradford 2015, 3). As conceded by the US authorities themselves, the diverse array of hard law directives and regulations of the EU are aimed at the EU member states and private actors active within the European Single Market and cannot be considered extraterritorial legislative overreach (Platt Majoras 2001, 14). Their external effects simply flow 'directly from the EU's pursuit of its internal goals … [They are] incidental externalities' (Bradford 2015, 42).

On the other hand, we already have a case study on hardened codes under the auspices of the Union: the EU code of conduct on business taxation. Scholars have critiqued this public code as being a 'disingenuous' hybrid regulatory regime and have pleaded for more transparent constructions where hard law and soft law operate in parallel to fully realise their respective and distinct strengths (Seeruthun-Kowalczyk 2012). However, where that code was aimed at the EU member states, GDPR codes are different since they seek to influence the conduct of private actors – many of whom are American companies. Although the borderless nature of internet services indeed presents a significant challenge to regulate effectively – let alone effectively and in full conformity with the principles of territorial jurisdiction – it could equally be called 'disingenuous' to adopt binding rules under the guise of uncontroversial, seemingly intra-EU soft law instruments to change corporate practices on a global level. Such a practice raises the spectre of 'European legislative imperialism' – an argument mostly put forward by American authors who see the control that the EU attempts to exert over mainly US-based companies as illegitimate and imperialistic (Kogan 2004; Layton 2018).

Leaving aside the territorial quandaries, the use of codes of conduct in an increasingly 'hard' way would also risk diminishing the unique characteristics identified above that make them so materially suited to regulate the tech industry. It is precisely their 'soft' nature that allows them to 'adapt more rapidly to changing marketplace circumstances, stakeholder input, and changing political headwinds' (Hagemann, Skees, and Thierer 2019, 38). If they are overly bound by the same constraints that characterise hard law, this valuable flexibility and adaptability might be lost. And in our modern society, where constant, unforeseeable technological evolutions increasingly shape our economic and social landscape, few things can be considered more valuable.

Notes

1. Facebook was accused of deceptive data gathering through the 'Facebook Research' VPN app (See: Constine 2019). Google allegedly did so through the 'Screenwise Meter' app (See: Whittaker, Constine, and Lunden 2019).

2. See tool #18 in European Commission (2017a).
3. The GDPR also encourages the use of certification mechanisms in articles 42 and 43. Scholarly literature, however, debates whether certification can be considered an ARI. For the sake of brevity and clarity, this contribution therefore does not focus on certification.
4. See already in 1959: Lindblom (1959).
5. For example by industry leaders and specialists in the field. See *infra* for a deeper discussion.
6. See the European Commission's remark that 'it is often hard to define the exact nature of a given soft regulatory approach' (European Commission 2017a, 88). See also how the Article 29 Working Party equates 'recommended practices' to codes of conduct in (Article 29 Working Party 2001, 3) The terms 'codes of conduct' and 'codes of ethics' are used interchangeably by consultancy firm Deloitte: (Deloitte 2005).
7. Keller (n 74) 5.
8. See the dominant position in which Facebook and Google find themselves vis-à-vis host state Ireland and its lead national data protection enforcer acknowledging the wish to avoid costly lawsuits against these companies, as described in Vinocur (2019).
9. Respectively the 'European Code of conduct for the use of personal data in direct marketing' by FEDMA (Federation of European Direct and Interactive Marketing) in 2003 and its long-gestating 2010 Annex, and 'Recommended Practice 1774 – Protection for privacy and trans-border data flows of personal data used in international air transport of passengers and of cargo' by IATA (International Air Transport Association) – with the caveat added by the Article 29 Working Party itself that the latter does not strictly qualify as a Community code of conduct in the sense of Article 27 (3).

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