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The Neofunctional Logic of EU External Competition Policy Engagement: Bilateral Relations

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Abstract

This working paper examines the conditions under which the European Union (EU) engages externally in competition policy and tests the appropriateness of applying a neofunctionalist approach for specifying the conditions under which the EU engages externally in this policy area. The working paper examines the EU's horizontal engagement through bilateral enforcement cooperation agreements, competition provisions in free trade agreements (FTA) and its role as a legislative model for unilateral adoption by third countries and regional blocs. Accordingly, by disaggregating the dependent variable of EU external engagement into four modes of engagement – policy export, policy promotion, policy protection and policy import – this study finds that neo-functionalism correctly specifies the conditions under which the EU engages externally in competition policy.

The working paper finds that where direct policy export through bilateral agreements is unfeasible, the EU seeks to engage in policy promotion horizontally through bilateral cooperation enforcement agreements and competition policy provisions in FTAs with major trade partners as a second-best mode of external engagement. Additionally, the study finds that the neofunctionalist approach also helps explain the documented incremental, unilateral adoption of EU competition policies and laws by third countries. The EU's external engagement through bilateral agreements and policy diffusion is examined using a mixed methods approach.

Keywords:

Competition Policy, Neofunctionalism, European Union, Externalisation, Global Governance

Table of Contents

Abstract	3
Table of Contents.....	4
List of Tables and Figures	5
List of Abbreviations.....	6
Introduction	7
Research Question	8
Research Methodology	9
Theorising EU External Competition Policy Engagement.....	9
Modes of EU External Competition Policy Engagement	9
Explanations for Modes of External Engagement.....	12
The Neofunctionalist Model of External Competition Engagement	14
<i>Relevance of the Neofunctionalist Model as Applied to Legal Integration.....</i>	<i>14</i>
<i>Justifying the Neofunctionalist Approach to External Engagement in Competition Policy.....</i>	<i>17</i>
<i>The Neofunctionalist Model of External Engagement in Competition Policy and Research Hypotheses.....</i>	<i>18</i>
Horizontal External Engagement of the EU in Competition Policy.....	21
Bilateral Enforcement Cooperation Agreements	22
Competition Policy Provisions in Bilateral Trade Agreements.....	24
<i>EU Policy Export Through FTAs.....</i>	<i>26</i>
<i>EU Policy Promotion through FTAs.....</i>	<i>26</i>
Unilateral Adoption of EU Competition Law and Policy	28
The Case of EU External Engagement with the United Kingdom in Competition Policy.....	29
Conclusion	30
References	32
Annex 1	39

List of Tables and Figures

<i>Figure 3.1: Inclusion of Competition Policy Provisions in EU Trade Agreements over time</i>	25
<i>Table 3.1: Comparison of the number of competition provisions in the EU's FTAs (including EEC/EC agreements).</i>	25

List of Abbreviations

BECA	Bilateral Enforcement Cooperation Agreement
CETA	Comprehensive Economic and Trade Agreement
DCFTA	Deep and Comprehensive Free Trade
DESTA	Design of Trade Agreements Database
DG Competition	Directorate-General for Competition
DG Trade	Directorate-General for Trade
ENP	European Neighbourhood Policy
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
ICN	International Competition Network
IO	International Organisation
IR	International Relations
MoU	Memorandum of Understanding
NCA	National Competition Agency
OECD	Organisation for Economic Cooperation and Development
RTA	Regional Trade Agreement
TNC	Transnational Corporation
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

Introduction

"The English constrain the merchant, but it is in favour of commerce." (Baron de Montesquieu, 1899, p. 323). Expanding on Montesquieu's aphorism, there is a broad consensus about the role of competition policy as a necessary externality-mitigating regulatory intervention for the efficient functioning of globalising "self-regulating markets" for the "greatest possible number of market participants" (Polanyi, 2001, p. 156 and Bütte, 2019, p. 447). Globalisation comprises, inter alia, an increase of transborder interactions leading to an "integration of national economies into the international economy through trade, foreign direct investment (FDI), short-term capital flows" as well as increased flows of goods and services (Bhagwati, 2004, p. 3). In this context, the interjurisdictional implications of market interactions caused competition policy to gain prominence as a central subject of global governance.

Competition law seeks to rectify the harmful effects of abuse of market power stemming from market monopolisation and competition-inhibiting mergers as well as other negative effects of anti-competitive business practices "impeding the efficient operation of markets" (Bütte, 2019, p. 448). These include the exploitation of a dominant market position, formation of cartels, tacit collusion to fix prices or share markets, prevention of market entry or suppression of market competition. The above practices need not have effects contrary to market competition for economic reasons depending on the particularities of the market concerned. However, the necessity of structuring and analysing markets for the presence of such anti-competitive practices implies an inherent politicisation of competition policy. Competition policy is political because it "entails the use of political power to constrain or redistribute market power" by defining which markets are relevant, what constitutes anti-competitive behaviour as well as how competition law adopted for such purposes is enforced (Bütte, 2019, pp. 448-449). It is this capacity to exercise and expand regulatory power by exporting or promoting its own competition policy model that casts the European Union (EU) as an important actor in global governance.

Competition policy provisions are at the core of bilateral enforcement cooperation agreements (BECAs) delimiting the interjurisdictional relations between competition authorities and in all recently concluded free trade agreements (FTAs) of the EU. However, the number of included provisions and their scope show considerable variation across the agreements. Although purportedly a politically insulated and technical area of law, the external competition policy engagement of the EU showcases significant variation in its approach to third countries, both through bilateral and multilateral negotiations as well as informal and formal engagements. Considering the "international system is not only a consequence of domestic politics and structures but a cause of them", study of the developments of transnational governance structures in competition policy and the role of the EU therein can further our understanding of domestic changes in third countries (Gourevitch, 1978, p. 911). Understanding the variables underpinning this external engagement and the mechanisms involved is therefore of particular importance given the political and strategic salience of structuring economic relations in an interdependent global economy (Financial Times, 12 April 2020).

Research Question

Competition policy “represents the first truly supranational policy” of the EU, tasked with applying and supervising competition policy within the Common Market on a regional level (McGowan and Wilks, 1995, p. 142). The EU’s role and engagement in the global diffusion of competition law, which has seen some 100 jurisdictions adopt competition laws between 1990-2016, therefore deserves careful scrutiny (Büthe, 2019, p. 455). The need to better understand the EU’s engagement in competition policy is evident in the context of an increased number of opportunities for transborder anti-competitive behaviour seeking to “resist increased and more fierce international competition” with effects spread across several jurisdictions (Demedts, 2015, p. 407). With what is considered “one of the most mature [competition policy] regimes” in the world, the EU has exported its internal competition law to neighbouring and acceding countries, attempted to include competition policy in the agenda of multilateral negotiations at the WTO and concluded numerous bilateral enforcement cooperation agreements (BECA) alongside free trade agreements (FTA) with competition policy provisions (Papadopoulos, 2010, pp. 3-4).

The research objective of this working paper is to suggest a coherent and dynamic explanation of these various external engagements the EU pursues whilst externalising its internal competition policy. While there are numerous studies proposing causal factors behind competition law adoption as well as associated comparative case studies considering the role of the EU, their scope of analysis is often limited to a certain type of external engagement (Büthe, 2019, p. 456). This working paper seeks to fill this lacuna in the research on EU external competition engagement by considering the mode of the EU’s external engagement as a dependent variable whose variation requires an explanation. The suggested explanation reaches beyond extant ascriptive references to the pursuit of expanded fair treatment and “market access in third countries for EU companies” or prevention of externalities to the single market from anti-competitive practices of firms in third countries (Aydin, 2012, pp. 668-669). In short, this working paper seeks to answer the following research question: “Under what conditions does the EU engage in external competition relations?”.

The paper argues in favour of applying a neofunctional lens in attempting to explain EU’s external engagement in competition policy and enforcement. The argument is developed by reviewing the relevant literature providing the theoretical and typological basis for the study, justifying the neofunctionalist approach and developing specific hypotheses for testing before proceeding to the analytical chapters. The analytical chapters test the hypotheses by analysing the EU’s horizontal engagement in competition policy before concluding. Horizontal engagement refers to participation in global governance by “using bilateral influence and regional institutions to entice other actors to assume EU policies” (Falkner and Müller, 2013, p. 7). Analysis of the EU’s external engagement on competition law and policy in the vertical domain through international organisations is the subject of a complementary working paper.

Research Methodology

The research methodology of this working paper reflects the methodological approach of Kenneth Waltz to theories in International Relations (IR). In that it explicitly derives hypotheses for testing from the neofunctionalist model presented below (Waltz, 1979, pp. 4-13). The paper proposes and justifies the use of the neofunctionalist approach for studying the EU's external engagement in competition policy to avoid "simplistic hypothesis testing" (Mearsheimer and Walt, 2013, pp. 431-438). The method followed in this study is a systematic review of evidence across the horizontal domain of EU external engagement pertaining to the outlined hypotheses, to evaluate their validity. Should the evidence fail to reject the hypotheses, this would justify the claim that the neofunctionalist approach identifies the correct variables that specify under which conditions the EU engages externally and through which specific modes of external engagement.

Considering the variety of instruments of external engagement in competition policy, comprising among others multilateral negotiations on a competition policy agreement, BECAs and FTAs, this working paper opts for an eclectic research method. The method consists in methodological triangulation of the hypothesised relations through a combination of various unobtrusive research techniques and data sources (Denzin, 1978, pp. 261, 301, 308). The working paper thus employs a mixed-methods approach combining the use of primary and secondary sources providing detailed evidence of vertical engagement in competition policy with computer-assisted statistical analysis. Rudimentary quantitative arguments using data from the Design of Trade Agreements Dataset (DESTA) qualify the qualitative analysis (Dür, Baccini and Elsig, 2020).

An acknowledged limitation of the combination of different techniques is a reduction in external validity, which would otherwise allow extrapolation and generalisations to apply to situations other than those involving a comparable context of legal integration (Denzin, 1978, p. 264). On the other hand, an advantageous aspect of this approach is a reinforcement of the validity of the hypotheses and of the theoretical model in general, should they withstand "the confrontation of a series of complementary methods of testing" (Webb et al., 1966, p. 174). Finally, two research interviews were conducted whilst gathering information for this study, however, as they have requested full anonymity, their remarks are not referenced in this working paper. Their remarks were nevertheless useful in informing the research process.

Theorising EU External Competition Policy Engagement

Modes of EU External Competition Policy Engagement

The increased frequency of market interactions and the embeddedness of the EU's economy as the largest trade bloc in the world cause its competition policy officials to be increasingly concerned in their regulatory and enforcement activities with decisions that have ramifications beyond the formal delineation of jurisdictions (Farrell and Newman, 2014, p. 334). Beyond extraterritorial application of the EU's competition law, the bloc engages with and through international organisations (IOs), such as the WTO, the United

Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD) as well as the International Competition Network (ICN). The EU engages with said IOs by seeking to promote “policy convergence and cooperation [...] in order to reduce the likelihood of trade-competition tensions and/or disputes” (Damro, 2006, pp. 868). Such disputes could originate from overlapping or incompatible competition rules and inadequate enforcement. Moreover, overlaps and incompatibilities increase uncertainty over the application and implementation of competition policy for actors operating in multiple jurisdictions.

For this purpose, it is necessary to conceptualise the externalisation of competition policy as a process of jurisdictional expansion. Following Lavenex and Schimmelfenig, jurisdictional expansion through the export and promotion of one’s competition law can be understood as a “response to complex interdependence” (Lavenex and Schimmelfenig, 2009, pp. 793-794). Bach and Newman further specify complex interdependence because of the externalities produced by the EU’s *acquis communautaire* on third countries and actors outside the EU (Bach and Newman, 2007, pp. 833-834). The externalities consist in EU norms extraterritorially affecting the behaviour of companies and countries seeking to establish commercial relations with the EU.

EU competition policy can extraterritorially affect companies and regulators because, using Bretherton and Vogler’s terminology, over the years, the EU has established a strong level of internal capabilities and presence that position it within a conducive “internal context of EU external action” to “exert influence beyond its borders” (Bretherton and Vogler, 2006, pp. 24, 29). By virtue of being an early adopter of competition law empowered with the assistance of the Court of Justice of the European Union, the Commission institutionalised review and enforcement procedures and assumed its role as a “prosecutor, judge and jury” (Akman and Kassim, 2010, p. 124, and *The Economist*, 18 February 2010). The existing literature therefore suggests that the EU is a powerful regulatory actor directly engaged in formulating competition policy that can be applied extraterritorially in case the activity of actors in third countries affects competition within the European single market.

This has been possible because of the strong initial centralisation of the internal legal competence and enforcement conferred by the successive treaties establishing the European Communities and later the EU. To illustrate, articles 101 and 102 of the Treaty on the Functioning of the European Union expressly prohibit anti-competitive agreements, decisions and concerted practices, and abuse of a “dominant position in the internal market” (European Union, 2007, art. 101, 102). Legislative basis in the Treaties is complemented by the Council Regulation 1/2003 laying down rules on the implementation of competition law and Merger Control Regulation 139/2004 concerning cross-border mergers all of which collectively, as Papadopoulos suggests, “have been the secret behind the success of the EU competition system” (Papadopoulos, 2010, pp. 168-169, Council of the European Union, 2003, p. 1, and Council of the European Union, 2004, pp. 1-22).

Moreover, the internal competences were further advanced by “gradual and piecemeal statutory advances and court decisions” (Damro, 2006, p. 210). However, since most bilateral negotiations concern “issue mandates beyond competition policy”, EU’s external representation in competition policy is in certain cases ensured by the Directorate-General for Competition (DG Competition) acting in coordination with EU member states or the

Directorate-General for Trade (DG Trade) (Damro and Guay, 2016, p. 93). In sum, the EU possesses internally a high level of regulatory capacity in the field of competition policy because of its well-developed regulatory expertise, coherence of legal provisions and strong “statutory sanctioning authority” (Bach and Newman, 2007, p. 831).

Aside from engagement through IOs, the high level of internal regulatory capacity allowed the EU to export its competition policy regime by, for instance, requiring acceding countries to “align their legislation” to the EU *acquis* in the field of competition and implement it accordingly (Boheim and Friesenbichler, 2016, pp. 570-573). Conversely, Botta argues that the EU has also engaged in importing aspects of competition policy from other jurisdictions, such as in the case of Article 4 of the aforementioned Council Regulation 139/2004 which was “amended to take into consideration ICN’s best practices” (Botta, 2013, p. 85).

For a systematic explanation of the above examples of engagement, consider the framework of Falkner and Müller, where the EU is understood to engage externally in competition policy across two dimensions: vertically and horizontally. The EU engages vertically through IOs where the EU “relies on its strong representation in international organizations and global transgovernmental networks”, and horizontally “using bilateral influence and regional institutions to entice other actors to assume EU policies” (Falkner and Müller, 2013, p. 7).

In both dimensions, four general modes of external engagement can be identified: policy export, policy promotion, policy protection and policy import, which collectively “shape global-level policies” (Müller, Kudrna and Falkner, 2014, pp. 1106, 1109). Policy export refers to situations where the EU “actively or passively projects its own policy paradigms or norms beyond its borders” (Müller, Kudrna and Falkner, 2014, p. 1106). Policy promotion on the other hand refers to cases where the EU does not have the capacity to project its internal policies, and therefore resorts to a “defensive strategy to deflect global pressures on policy imports” (Müller, Kudrna and Falkner, 2014, p. 1109). Policy protection describes actions where the EU seeks to “defend distinct domestic rules and policy preferences” (Müller, Kudrna and Falkner, 2014, p. 1111). Finally, policy import refers to the logical complement of policy export, that is, to interactions where the “EU takes policies from global regimes”, such as in the case of transposition of external legislation for internal harmonisation (Müller, Kudrna and Falkner, 2014, pp. 1112-1113).

The details of the mechanisms through which the four modes of external engagement occur can be described in both constructivist and rationalist terms (Young, 2015, pp. 1239-1240). The former involves persuasion, which “is an active mechanism of policy export that is facilitated by socialisation and learning processes” and may result in unilateral emulation by third actors (Falkner and Müller, 2013, pp. 8, 10). The rationalist mechanism on the other hand involves the use of “threats and promises to promote external preferences” which are mediated by the institutional setting (Falkner and Müller, 2013, p. 9). Falkner and Müller thus argue that multilateral negotiations “constrained by rules and procedures” will result in “rule-mediated outcomes”, whereas “bilateral bargains” will result in “power-based outcomes” (Falkner and Müller, 2013, p. 9).

Falkner and Müller further identify several conditions upon which the EU’s ability to engage through the two mechanisms in both horizontal and vertical dimensions depend. The

conditions they identify are the international institutional setting comprising “procedures, membership conditions, decision-making and dispute settlement” as well as the extent of EU presence as a “latecomer” or “first mover” (Müller, Kudrna and Falkner, 2014, p. 1107). Additional conditions they identify are also the extent of EU competences (formal delegated authority and informal bargaining power) and EU unity (coherence of member state and EU actors’ preferences). Having suggested ways in which external engagement of the EU and convergence and co-operation can be conceptually disaggregated, the four modes presented form the dependent variable whose variation across the horizontal and vertical domains will be explored in the next sections

Explanations for Modes of External Engagement

There exists a significant body of literature suggesting why states enter into agreements on competition policy or why they cooperate in international organisations (see Mearsheimer, 1994-1995, p. 9, Keohane, 1988, pp. 386-393 or Sokol, 2007, pp. 265-276). However, competition policy has only recently been ascribed the status of “an emerging issue for International Political Economy” requiring additional explanations (Büthe, 2019, p. 448). To illustrate, Papadopoulos provides an extensive review of the EU’s external engagement on competition policy from dedicated bilateral enforcement cooperation agreements to the EU’s engagement through FTAs, IOs and regional trade agreements (RTAs) (Papadopoulos, 2010, *passim*). However, the review relies on a doctrinal analysis along the different dimensions of engagement and does not suggest a clear answer to the conditions under which the EU engages externally in competition policy.

To illustrate one strand of existing explanations, Aydin reviews four strategies the EU pursues in externalising its competition policy. These range from unilateral (consisting in extraterritorial application of internal competition policy law), multilateral and bilateral (through trade and cooperation agreements) to *acquis* transfer to EU membership candidate countries and involvement in non-binding multilateral fora (Aydin, 2012, pp. 668-669). While the strategies described encapsulate the different engagements in both vertical and horizontal domains identified above, the arguments are limited to a general EU interest in ensuring market access, effectiveness of preventing anti-competitive practices and fair treatment for European companies. Further, Aydin notes the presence of preferences to replicate “[the EU’s] own competition regime developed from the provisions of the Treaty of Rome” in a binding multilateral commitment as well as clashes of “bureaucratic self-interest” in externalising competition policy between the DG Competition and the DG Trade (Aydin, 2012, pp. 671-672, and Damro, 2006, p. 873).

Focusing on instances of extraterritorial application of EU competition law, Bradford points to four conditions for the “Brussels Effect” (the successful externalisation of competition policy) to materialise: “market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility [of remedies, mergers, divestitures, cartel investigations]” (Bradford, 2020, pp. 106, 109, 110, 129). While the conditions allow us to identify cases of successful externalisation of competition policy, they do not supply a rationale for the external engagement of the EU. Rather, they provide a robust litmus test for the presence of a distinguishable impact of externalisation.

For the case of competition policy provisions in FTAs, Demedts provides seven possible explanations including that of “regulatory export of own model/approximation to the *acquis*” as well as issue trading, symbolic value or “facilitation of relations between antitrust agencies” (Demedts, 2015, pp. 426-430). Each of the seven reasons listed provides a separate instrumental strategic interest justification for the EU’s inclusion of competition policy provisions in trade agreements. However, collectively, the explanations leave the presence of competition policy provisions both overdetermined (by allowing for seven causal processes) and the exact decision-making process concerning their inclusion theoretically underdetermined.

A complementary contribution to the explanation above is that of Drezner who emphasises the role of causal factors external to the EU’s capacities. Drezner argues that mechanisms of policy convergence, harmonization or clustering at multiple nodes depend on the relative powers and decisions of the most important actors in the regulatory domain (Drezner, 2005, pp. 842-846). The extent of policy convergence is in his view theorised to depend on the outcome of a coordination game between the great powers that takes into account the costs associated with regulatory conversion. The costs of conversion include the “dissatisfaction with the new standards among voters, interest groups, or members of the selectorate” (Drezner, 2005, p. 845). This power-based model concurs with Damro’s argument that the EU “has the intention to externalize its market-related policies and regulatory measures” because it is a market power by virtue of the size and attraction of the single market as well as its regulatory expertise and capacity (Damro, 2012, p. 690).

One other rationale for EU external engagement on competition policy could be based on firm-level costs of adjustment required by adherence to multiple jurisdictions with incompatible or asynchronous rules on notification or investigation deadlines. Such incompatibilities imply that actors operating across jurisdictions with differing rules are faced with adjustment costs due to the necessity to adapt their activities according to the requirements of each jurisdiction. That these firm-level costs of cross-jurisdictional adjustment can be considerable is a proposition supported by Kalyanpur and Newman (Kalyanpur and Newman, 2019, pp. 12-13, 17). Kalyanpur and Newman document that European firms were “386 percent more likely to exit” the US equity markets in response to adjustment pressures following the enactment of the Sarbanes Oxley Act by the US, “which increased reporting requirements and altered the corporate governance practices” (Kalyanpur and Newman, 2019, pp. 3, 12-13, 17). With these costs in mind, transnational corporations (TNCs) spanning several jurisdictions are likely to exert pressure on regulatory institutions to promote regulatory convergence.

A corollary of the firm-level costs are the costs incurred by regulators in their attempts to limit anti-competitive behaviour. Regulators incur costs of inefficient processes of information exchange, or lack of cooperation that could, in the case of cartel investigations across several jurisdictions, jeopardise attempts to detect and sanction a cartel (Bradford, 2020, pp. 101, 111). A concrete example of such an incompatibility is the “standards for determining the structure of a market [...] to decide whether a merger would imperil competition” (Büthe and Mattli, 2011, pp. 23-24). Such standards differ significantly across jurisdictions and have led aside from duplication of assessments to contradictory assessments from different competition authorities. In the case of the merger between

General Electric and Honeywell, this led to significant interinstitutional tensions that spilled over into the political realm (Papadopoulos, 2010, pp. 44-45).

Using the four modes of external engagement framework, Botta argues that competition policy import by the EU has been very limited, whereas policy export is notable in the case of accession agreements (Botta, 2013, pp. 87, 80). Similarly notable, according to Botta, is the EU's protection of its own competition policy in international fora, such as the OECD, ICN and UNCTAD. Botta further suggests that it is "predominantly through the soft mechanisms of persuasion and emulation that vertical export develops an effect even beyond the EU's neighbourhood" rather than through the rationalist mechanism of bargaining to achieve power-based or rules-mediated outcomes (Botta, 2013, p. 87).

However, whilst the use of the analytical framework of Müller and Falkner by Botta facilitates the identification of the variables that were instrumental in estimating the extent to which the EU has been able to achieve its goals, it leaves the mode of external engagement of the EU underdetermined. To illustrate this concretely, it remains unclear why, according to the variables of EU unity, international institutional setting and extent of EU competences, the bloc would specifically choose to promote competition policy in developing and in-transition countries. On this view, policy promotion through competition-related capacity-building and technical assistance provisions in bilateral trade agreements with acceding and candidate countries, selected Euro-Mediterranean partners and former Soviet Union states remains puzzling (Papadopoulos, 2010, pp. 134-136). This puzzle is resolved once we accept an implicit assumption of the EU's strategic interest in promulgating its internal competition policy regime. However, making such an assumption necessitates theoretical justification.

The above literature review already indicates traces of variables that are central to a neofunctionalist approach to external competition engagement. This approach is reviewed in the next sections before arriving at a concrete model specifying hypotheses for testing in the latter part of this working paper.

The Neofunctionalist Model of External Competition Engagement

Relevance of the Neofunctionalist Model as Applied to Legal Integration

The prima facie justification for the neofunctional model lies in the striking similarity of the microfoundations of the legal integration process within the EU and of the efforts concerning international cooperation and convergence in competition policy (Burley and Mattli, 1993, p. 42). Burley and Mattli argue that legal integration within the EU and the role of the European Court of Justice can be "convincingly and parsimoniously" explained with reference to the neofunctionalist approach. This is because the approach provides a systematic "political account of how the individual actors involved, such as judges, lawyers and litigants with specific identities, motives, and objectives", "achieved their objectives in the process of legal integration" (Burley and Mattli, 1993, p. 52).

The neofunctionalist account traces its roots to Ernst Haas's theory of political integration. The theory seeks to explain the process "whereby actors in several distinct national settings

are persuaded to shift their loyalties, expectations, and political activities towards [...] institutions [which] possess or demand jurisdiction over the pre-existing national states" (Haas, 1961, pp. 366-367). Although originally applied to the process of regional political integration in Europe, the approach can nevertheless be mined for its valuable identification of "categories likely to be receptive to integration" and its "description of the actual mechanics of overcoming national barriers within a particular functional category" (Burley and Mattli, 1993, pp. 53-54).

The categories of interest to neofunctionalism include the actors in the integration process who are both "above and below the nation-state" (Burley and Mattli, 1993, p. 54). Adapted to the case of competition policy, actors below involve the national competition agencies (NCA) and the associated civil servants and business representatives. Actors above the state in competition policy are international organisations, such as the ICN or OECD, and supranational actors such as the EU. The institutions above the nation state "promote integration, foster the development of interest groups, cultivate close ties with them and with fellow technocrats in the national civil societies" (Burley and Mattli, 1993, p. 54).

Moreover, neofunctionalism aligns itself with rational choice theories to provide the following causal link for the mechanisms of external engagement: rational self-interest.¹ Neofunctionalism also maintains that the socialisation of actors from above and below the different national constituencies originates from a "process of community formation [...] dominated by nationally constituted groups with specific interests and aims" (Haas, 2004, p. xxxiv). This process is however determined by rational instrumental considerations of actors "willing and able to adjust their aspirations by turning to supranational means when this course appears profitable" (Haas, 2004, p. xxxiv).

Such rational instrumental considerations are however conceived to entail integrative effects through incremental expansion (Haas, 2004, p. xxiv). Haas theorises that incremental expansion takes the shape of functional, political, and axiological spill-overs. A functional spill-over refers to the process where through an initial incremental integrative effort, the desired goal can be subsequently achieved only with complementary action in a related field. Complementary action is in turn required because of the existence of 'functional discrepancies' that imply additional costs from non-convergence, thereby incentivising further integrative efforts.

In short, a functional spill-over considers the effects of interdependence of legal and economic relations in a modern economy. In the case of competition policy, a functional spill-over would be equivalent to the adoption of an act in effect in some other jurisdictions, which would gradually necessitate the adoption of other aspects of competition law conforming to the legal philosophy underlining the adopted law. Integration in one sector could thus facilitate "extension to the entire economy even in the absence of specific group demands" (Haas, 2004, p. 297).

A political spill-over refers to the related effect of incremental behavioural change induced by an "incremental shifting of expectations, the changing of values and the coalescing at

¹ The assumption of natural self-interest on the part of the agents involved is justified in prompting questions about the unfalsifiability of the neofunctionalist approach, since every outcome could be *ex post* construed as a result of purposive action. This aspect is addressed below.

the supranational level of national interest groups and political parties in response to sectoral integration" (Burley and Mattli, 1993, p. 55). Such shifts can occur in the case of competition policy because of "legislative borrowing", during which law applied in other jurisdictions, non-binding recommendations or other soft law arrangements issued at the IO level "harden" by becoming national law. An example of this hardening process would be the acceptance of International Financial Reporting Standards into EU law (with appropriate carve-outs where necessary). As a result, the associated process "hardened International Accounting Standards Board-promoted soft law not just in Europe but around the world" (Newman and Bach, 2014, p. 437). This process of importing (or equivalently externalising) the creation of legal acts creates shifts in the expectations of domestic political actors in both the importing as well as in the exporting jurisdictions.

This incremental shifting of expectations is a crucial element for another effect postulated by neofunctionalism: the upgrading of common interests (Haas, 2004, p. 68). In the interpretation of Mattli and Burley, upgrading refers to the incentive of actors involved to reach a common policy or best practice recommendation despite possible disagreement by considering related policy fields as possible sources of concessions, thereby strengthening the resolve to reach compromises (Burley and Mattli, 1993, p. 56). In international cooperation on competition policy, this would specifically refer to the function of IOs as "institutionalised autonomous mediators" that seek to facilitate compromise between the participants which in return strengthens the IOs as a source of authority (Burley and Mattli, 1993, pp. 56, 69). Specifically, this upgrading process would refer to the gradual axiological shift in the perception of the authority of best practices and recommendations issued by the ICN. The issued non-binding instruments would be expected to become gradually perceived as universally agreed principles serving an upgraded long-term common interest. This process would be facilitated by the decentralised institutional structure of the ICN as a conglomerate of individual participating NCAs with a direct stake in the process of formulating the recommendations.

Much like in the context of the ECJ investigated by Burley and Mattli, the context of policy convergence in the field of competition policy occurs in a "nominally apolitical context" (Burley and Mattli, 1993, p. 56). The context of apparent depoliticization of competition policy fits one of the crucial assumptions of Haas's neofunctionalist theory. The theory underscores the gradualism of indirect integrative processes that penetrate the political sphere by firstly permeating the technical and economic fields most removed from political decision-making. Competition policy penetrates the political sphere with the power of competition authorities to delineate the structure of relevant markets and impose, for example, "record-high fines and behavioural remedies against dominant US companies" (Bradford, 2020, p. 112). This indicates that a seemingly technical, econometry-based policy may be at the forefront of the fields through which neofunctionalism would expect legal integration to proceed.

Justifying the Neofunctionalist Approach to External Engagement in Competition Policy

Aside from internal legal integration within the EU, neofunctionalism has already been applied to areas of EU external action, such as the “enlargement and neighbourhood policy” as well as to “EU trade policy and defence policy” (Bergmann and Niemann, 2018, p. 422). To illustrate, Bergmann and Niemann highlight the assumptions of a i) dynamic incremental integration process; ii) “rational, self-interested actors with the capacity to learn and change their preferences”; and iii) “interaction characterised by positive-sum games and incremental decision-making” (Bergmann and Niemann, 2018, p. 421). These assumptions are crucial for the selection of independent variables rooted in the neofunctionalist approach.

In addition to the three aforementioned endogenous neofunctionalist logics of functional spill-over, incremental shifting of expectations and the upgrading of common interests, Bergmann and Niemann introduce the additional exogenous logic of external spill-over (Bergmann and Niemann, 2018, pp. 426-430). External spill-over incorporates into the general neofunctionalist approach cases of unilateral legislative borrowing from other jurisdictions, which is particularly appropriate for applying neofunctionalism to EU external engagements. Unilateral adoption of competition law from the EU by third countries thus underlies the shift of expectations resulting in a political spill-over. This horizontal diffusion of competition law could be justified by referring to the attractiveness of the EU single market as well as the developed regulatory capacity of the EU in the field of competition law (Damro 2012, p. 688). Moreover, this spill-over mechanism integrates the insight of Bach and Newman that the strong institutional structure in the form of well-developed case law, the authority of the Court of Justice of the EU and effective federalisation of the implementation of competition policy amplifies the market size effect and EU’s power of attraction (Bach and Newman, 2007, pp. 829-830).

Neofunctionalism has nevertheless been challenged with criticism noting excessive ambition contrasted with a lack of explanatory power for slowdowns or reversals in integrative processes as well as unfalsifiability or selection bias (Moravcsik, 2005, p. 350). The account above however illustrates the pertinence of the neofunctionalist approach of Mattli and Burley in explaining legal integration within the European community and beyond. To avoid charges of selection bias, the variables they identified were argued above to broadly match the context of externalisation of competition policy. Further, to avoid excessive ambitions, following McGowan’s recommendation, this working paper applies the neofunctional approach in its limited scope to the “dynamics and development of individual sectors”, specifically to competition policy and the externalisation thereof (McGowan, 2007, p. 13). To counter accusations of unfalsifiability within the context of this working paper, the hypotheses derived from the neofunctionalist approach below are eminently testable and falsifiable. Should the empirical findings directly contradict the hypothesised results, the approach could be rejected despite the capacity of the assumption of rational self-interest to provide *ex post* rationalisations.

Limiting the focus on the process of legal convergence within one policy area also avoids the charges of neorealist intergovernmentalism. Its proponents could maintain that any resulting convergence efforts merely reflect the preferences of state actors that delimit the

discretion of the Commission in exercise of its powers (Tsebelis and Garrett, 2001, pp. 361-364). Garrett and Tsebelis's counterargument about the important role of an informed intergovernmental principal is however less appropriate in the case of competition policy because competition policy is significantly insulated from intergovernmental decision-making. As competition policy is arguably the most supranational of all EU policies, intergovernmentalist approaches as an alternative to neofunctionalism are judged unlikely to be significant in the context of this working paper.

This working paper therefore judges a neofunctional appraisal as appropriate for the study of the EU's external engagement in competition policy. A central contribution of the neofunctional approach considered in the context of this working paper is the stress that it places on the dynamic of integration, which it contextualises as a process needing explanation in its own right. This strongly concurs with the incremental and procedural nature of jurisdictional expansion through the promulgation of specific competition laws, policies, and general approaches to competition policy.

The Neofunctionalist Model of External Engagement in Competition Policy and Research Hypotheses

The presented neofunctionalist model of EU external engagement in competition policy seeks to reconcile the surveyed literature by providing a consistent and inclusive dynamic explanation of the processes of diffusion and exportation of competition law from the EU towards other jurisdictions. Following the model of Lavenex and Schimmelfenig in conceptualising explanations by clearly presenting assumptions and hypotheses of an explanatory approach, the general neofunctionalist argument is distilled into a set of assumptions and hypotheses presented below (Lavenex and Schimmelfenig, 2009, pp. 802-805). At the outset of the model is the following assumption stemming from the argumentation about the high level of actorness of the EU and the micro-level costs of policy adjustment in matters of competition policy:

(A1): The EU has a strictly decreasing order of preference between the following modes of external engagement in competition policy: policy export, policy promotion, policy protection and policy import.

The developed and extensive competition law and case law of the EU is likely to entail significant adjustment costs for the EU if it were to import competition law from other jurisdictions. The EU has already embedded diverging competition policy philosophies from its member states during the process of its formulation by virtue of comprising economies with different structural features as described by the Varieties of Capitalism approach (Fioretos, 2001, pp. 228, 231-232). Moreover, a strategy of policy import of "harmonizing globally to harmonize internally" described by Müller, Kudrna and Falkner is also unlikely to be preferred by the EU (Müller, Kudrna and Falkner, 2014, pp. 1113-1114). This is because there is no corresponding internal deadlock in competition policy as there was, for instance, in the case of agricultural policy or financial regulation that the authors identify.

Similar reasoning applies to the case of policy protection, which would presuppose that the EU wishes to preserve existing rules for reasons of being “in a minority position in the relevant global policy regime” (Müller, Kudrna and Falkner, 2014, p. 1111). As argued above, there is no prevalent global norm from which internal competition policy would have to be protected. Moreover, the completeness and non-divisibility of competition law, and the possibility of extraterritorial application against behaviour impacting the common market shift the costs of non-adherence to EU competition law onto other jurisdictions. The increasing costs resulting from incomplete adoption (through carve-outs) or inefficient implementation by other actors further justify a strict preference for policy export over mere policy promotion.

The Strategic Interest Explanations are incorporated into the model in combination with (A1) by emphasising the neofunctionalist assumption of rationalist self-interest of the actors involved:

(A2): EU actors involved in externalising competition policy are motivated by rational self-interest and a desire to minimise domestic costs of non-alignment of competition law across jurisdictions.

Given their respective preferences, rational, self-interested actors (including both DG Competition and DG Trade) would seek to satisfy their preferences by choosing the most appropriate venue for external engagement (Damro, 2006, pp. 869-874). This allows us to incorporate the insights of the literature on “venue shopping” that has already been used to explain EU external engagement in competition policy into the neofunctionalist model (Damro, 2006, p. 869). Moreover, building on the two presented mechanisms through which externalisation of internal EU policy takes place (rational bargaining and constructivist persuasion) and using the identified neofunctionalist variables, it is possible to hypothesise the conditions under which the EU engages in externalising competition policy.

A1 suggests that the EU is likely to initially pursue policy export where possible. Although the two mechanisms of external engagement are complementary, given the non-divisible nature of union law (as in the case of decisions on mergers), externalisation through direct export of ready-made laws or provisions will be preferred through the first, rationalist mechanism of externalisation via multilateral or bilateral bargains. Such bargains made in the context of political negotiations will result in power-based or rules-mediated externalisation outcomes where the provisions are externalised in their entirety:

(H1): Power-based or rules-mediated bargaining is a preferred mechanism for EU competition policy export.

Moreover, in line with the neofunctional approach, the constructivist mechanism is more likely to be the main mechanism of externalisation in cases where politicisation of competition policy is low, because an apolitical context was argued to be a precondition for the upgrading of common interests. However, as A1 indicates, the presence of strong political interests precluding engagement in the form of policy export is a necessary and sufficient condition for selection of policy promotion as the second-best option for external engagement. For these two reasons, the incremental and socialisation-based nature of

cooperation between politically insulated group of experts, as in the case of the ICN, is likely to entail engagement in the form of policy promotion rather than policy export:

(H2): The EU will engage through policy promotion or policy protection rather than policy export or policy import in international settings facilitating persuasion, socialisation and learning effects.

A complement of H2 is:

(H2bis): The EU will engage either through policy export or policy import in an institutional context facilitating rational political bargaining.

The inclusion of (H2bis) is justified by considering both (A1) and (A2), since rational actors would seek to export ready-made provisions in their entirety through, ideally, binding agreements. This is especially likely in cases where the EU negotiates from a favourable position of power asymmetry. The attraction of the common market emphasised in the conceptualisation of the EU as Market Power Europe and the status of the EU as “an essential player and a powerful bargainer in the multilateral trading system” create such an asymmetrical bargaining relation favourable to the EU (Meunier and Nicolaïdis, 2006, p. 909).

Furthermore, externalising EU competition policy through a binding multilateral agreement would be preferable to externalising it bilaterally. This is because a multilateral externalisation would entail much larger costs of deviation from the conditions of the multilateral agreement for non-complying states. With competition laws currently implemented in over 130 jurisdictions, the negotiation costs of bilateral agreements would have exceeded those of a single multilateral agreement (Büthe, 2019, p. 455).² This justifies the addition of assumptions A3 and A4, which indicate that a second-best alternative to such a multilateral agreement would be a series of bilateral agreements:

(A3): A binding multilateral trade agreement on competition policy externalising EU internal policy would be preferable to bilateral trade agreements with competition policy provisions.

(A4): Bilateral trade agreements with competition policy provisions are a second-best option for the EU in externalising competition policy.

A neofunctional implication of A4 would also be that for a maximisation of the impact of potential spill-over effects into third countries, both trade and dedicated competition policy cooperation agreements would be most preferred with major countries. This reflects Drezner’s arguments about the relevance of a coordination game between great regulatory powers in global governance:

(H3): Maximisation of potential sectoral spill-over effects to third countries entails policy export through binding agreements and policy promotion through unenforceable provisions in trade agreements and enforcement cooperation agreements with the EU’s major trading partners.

² Over 8000 such bilateral agreements would be required to completely cover cooperation between each jurisdiction.

The presence of functional spill-over effects and a gradual shift of perceptions conforming to an incremental upgrading of common interests on the part of third countries would also manifest themselves in the unilateral adoption of EU practices and competition law by third countries:

(H4): Functional, political, and axiological spill-over effects of legal integration provoke unprompted incremental policy export from the EU towards third countries.

Finally, the neofunctionalist approach could be interpreted as analytically prior to both strands of strategic interest explanations and micro-level explanations briefly explored above (Moravcsik, 1997, pp. 542-543). This is because it endogenizes both strategic interest behaviour and microfoundations based on the costs of adjustment. Additionally, it outlines the conditions under which the assumptions about EU preferences underlying both strategic interest explanations and micro-level explanations hold. The presented hypotheses related to the horizontal dimension are tested in the next chapter whilst their relevance for the vertical dimension is examined in a related working paper.

Horizontal External Engagement of the EU in Competition Policy

The analysis in this chapter seeks to establish the extent to which the neofunctionalist model succeeds in specifying the conditions under which the EU engages externally on competition policy in the horizontal domain through BECAs, FTAs and by serving as a model for RTAs and third countries. A full evaluation of each of the agreements, including in matters of precision, bindingness and obligation would require extensive analysis beyond the scope of this working paper. The chapter rather seeks to ascertain whether neofunctionalism correctly specifies the conditions under which the EU engages in and through such agreements.

The pertinent hypotheses for testing in this chapter are therefore H1, H3 and H4. The neofunctional approach would lead us to consider power-based bargaining in negotiating bilateral agreements as a preferred mechanism for EU policy export. H3 additionally implies that bilateral agreements would be sought with major trading partners to maximise spill-over effects, which, as H4 implies, would lead to unprompted policy export from the EU towards third countries. H1 and A2 imply that where possible and convenient, the EU would attempt to export its internal competition law and policy through binding bilateral agreements. If unrejected, H3 and H4 would explain the logic behind pursuing unenforceable BECAs and competition provisions in FTAs removed from dispute settlement mechanisms.

In providing evidence as to the validity of the hypotheses, the chapter proceeds to analyse the horizontal EU external engagement in competition policy by surveying the different types of agreements. Firstly, the chapter analyses BECAs and Memoranda of Understanding (MoU) concerning competition policy. This is followed by an analysis of the presence of competition provisions in the EU's FTAs. Further, the chapter considers the EU's role as a model for unprompted engagement through unilateral adoption of EU competition law and policy by third countries and regional blocs. Finally, the chapter briefly examines the EU's external engagement in competition policy with the United Kingdom.

The analysis will proceed by considering the relevance of the independent variables identified by the neofunctionalist approach in addressing the question under which conditions the EU engages externally in competition policy. The relevant variable from H1 is the capacity for policy export through power-based bargaining. Where such capacity of the EU is lacking, H3 would predict policy promotion through binding agreements targeted at major trading partners. Finally, where spill-over effects (in functional, political, and axiological terms) are present, they would be expected to take the form of unilateral adoption of EU competition law and policy by third countries and by regional organisations in accordance with the EU's motivation to "export institutional isomorphism" (Bicchi, 2006, pp. 287, 292-293).

Bilateral Enforcement Cooperation Agreements

Economic globalisation has amplified the opportunities available to TNCs to engage in anti-competitive practices, such as collusion or price fixing. In the absence of a multilateral agreement on competition policy, the EU opted to reduce the costs of preventing such anti-competitive practices by pursuing bilateral enforcement cooperation agreements (Papadopoulos, 2010, p. 60). In contrast to FTAs, BECAs distinguish themselves in that they are legally binding, but "their content is de facto unenforceable" (Demedts, 2018, pp. 93-94, and Papadopoulos, 2010, p. 75). This leads Papadopoulos to place them in the category of soft-law instruments (Papadopoulos, 2010, p. 59). There are two recognised generations of BECAs, with the "first generation agreements centred around the comity principle", whose effectiveness "depends to a great extent upon the goodwill of the parties (Demedts, 2018, pp. 93-94, and Papadopoulos, 2010, p. 75). The second generation foresees deeper cooperation through possible amendments to existing laws to allow "the exchange of confidential information between the competition agencies of the contracting parties" (Demedts, 2018, p. 94).

Applying the neofunctionalist approach to such agreements, A1 implies that in the case of impossibility of policy export, the EU would prefer to engage externally through policy promotion to "deflect global pressures on policy imports" (Müller, Kudrna and Falkner, 2014, p. 1109). A2 in turn implies that EU actors seek to reduce domestic costs of non-alignment of competition law across jurisdictions through enhancing cooperation. A decision to engage in the conclusion of unenforceable BECAs would therefore, according to the neofunctionalist logic, depend on the estimated capacity of the agreement to promote or protect the EU's competition policy and foster spill-over effects. It would also depend on the foreseen reduction in the cost of non-alignment provided by the cooperation. Since there are also costs to negotiating such agreements, the neofunctionalist logic would imply that there would be few such agreements in general and that they would be concluded between major jurisdictions for reasons of maximising possible spill-over effects.

The EU has concluded dedicated first-generation competition agreements with Canada, Japan, South Korea, Mexico, and the United States, and one second-generation agreement with Switzerland (Directorate-General for Competition, 2020). The condition for targeting major trading partners is borne out by the evidence, since all six countries are among the

EU's top 12 trading partners (Directorate-General for Trade, 2020). However, the utility of the first-generation agreements for policy promotion has been disputed by Demedts. Based on an analysis of the effects of the EU-US agreements, Demedts argues that while the agreements provide a legal basis for cooperation between competition authorities, they "will not create the incentive to do so" (Demedts, 2018, p. 162). Papadopoulos corroborates this assessment in claiming that "at least in the case of EU-US cooperation on competition, the principle of comity has had a minimal effect" (Papadopoulos, 2010, pp. 69-70). Such negative assessment can be explained within the neofunctional framework with reference to the lack of upgrading of common interests that would be essential to building trust between the self-interested partner authorities (Papadopoulos, 2010, pp. 80-81).

The EU's engagement with other major trade partners does not take the form of BECAs, but rather that of MoUs. The EU has concluded MoUs with China, Brazil, India, Russia, and South Africa (BRICS) (Büthe and Cho, 2017, p. 127). However, the MoUs contain a degree of expressed commitment even lower than that of BECAs, since as Büthe and Cho suggest, their language is crafted to avoid appearing "politically binding" despite being "clearly legally non-binding" (Büthe and Cho, 2017, p. 135). The objective of the memoranda, however, appears to be like that of BECAs in that they aim at prevention of future conflicts between competition authorities and establishment of rules for "notification, consultation, exchange of information, comity and technical assistance" (Büthe and Cho, 2017, p. 123).

Furthermore, similarly to the BECAs above, the mode of engagement represented by the memoranda appears to blend the objectives of policy promotion and policy protection. This is because both types of agreements serve to "deflect global pressures on policy imports" by legitimising existing domestic procedures as well as to "defend distinct domestic rules and policy preferences" (Müller, Kudrna and Falkner, 2014, pp. 1106, 1109). The overall objective, however, following Büthe and Cho's reasoning could be that the EU wishes to pre-empt the ascendancy of emerging countries in global regulatory governance (Büthe and Cho, 2017, p. 134). Evidence in support of this hypothesis is that the textual analysis of Büthe and Cho suggests a significant difference between the clusters of BECAs and MoUs and similarity within the two clusters (Büthe and Cho, 2017, pp. 128-131). Further detailed legal analysis of such agreements would, however, be necessary to corroborate this conclusion.

In summary, BECAs and MoUs present a borderline case of policy promotion and policy protection engagement of the EU. The few such agreements concluded by the EU, all with major trade partners of the EU, point to the validity of the neofunctional hypothesis H3. This is because H3 would have us expect that the conditions under which the EU concludes such agreements are specified by the opportunity to maximise spill-over effects and reduce domestic enforcement costs. Both conditions are more easily satisfied with major trade partners.

Further, following the preliminary assessments of the agreements' unremarkable efficacy, the case of dedicated agency-to-agency agreements points to the preference of the EU to engage through more enforceable agreements that can have tangible policy export or policy promotion effects. Finally, since the agreements concern conditions for iterated cooperation of competition authorities, they facilitate socialisation, persuasion and learning

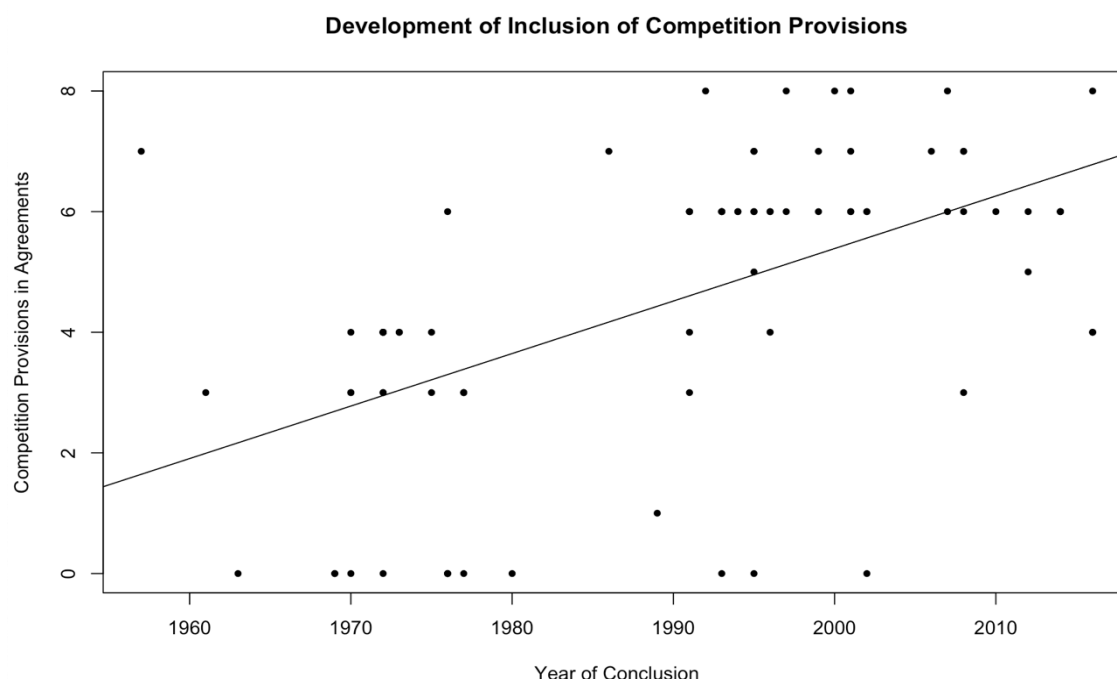
effects. Indirectly, the case of such agreements therefore also supports H2, since through such agreements, the EU engages in policy promotion or protection rather than policy export.

Competition Policy Provisions in Bilateral Trade Agreements

The complementarity between trade liberalisation and competition policy has already been argued above to lie in the “opportunities to gain from transnational collusion” (Büthe, 2014, p. 223). These emerge from the fact that monitoring and preventing transnational anti-competitive behaviour in “global markets is more difficult and costly” (Büthe, 2014, p. 223). It is therefore unsurprising that competition policy provisions have increasingly permeated FTAs around the world with at least half of all FTAs concluded since 1987 including at least one chapter or article dedicated to competition policy (Bradford and Büthe, 2015, p. 257). In the case of the EU’s FTAs, there has been considerable variation in the number and scope of the provisions included (Szepesi, 2004). The EU’s market power and the possibility to channel this power through trade by making market access conditional on the adoption of the EU’s laws, policies and standards make the FTAs a vehicle for policy export and policy promotion (Meunier and Nicolaïdis, 2006, p. 910).

The “informal moratorium on the negotiation of FTAs from 1999 until 2006” provides evidence in support of the EU’s clear preference for a multilateral trade agreement presented in A3 (Demedts, 2015, p. 417). With the negotiations at the WTO resulting in a stalemate, the European Commission issued the “Global Europe” communication calling for addressing competition policy issues through FTAs with “stronger provisions for competition” (Commission of the European Communities, 2006, p. 9). To illustrate the development of inclusion of competition policy provisions in FTAs concluded by the European Community and the EU, data collected by Dür, Baccini and Elsig on competition provisions in FTAs are presented in the figure below (Dür, Baccini and Elsig, 2014, pp. 353-375). The figure shows the totality of competition policy provisions in each agreement concluded by the EC and the EU. The figure underlines a clear trend of increasing average complexity of FTAs in terms of inclusion of competition provisions.

Figure 0.1: Inclusion of Competition Policy Provisions in EU Trade Agreements over time



Source: Compiled by the author.

The stated intention to conclude agreements with stronger competition provisions is corroborated by a simple t-test. The results below show that there is a highly statistically significant difference between the number of provisions in agreements concluded prior to and after the Global Europe Communication. Specifically, the simple bivariate regression suggests that post-Global Europe agreements contain on average almost 1.8 (or 43%) more competition provisions.

Table 0.1: Comparison of the number of competition provisions in the EU's FTAs (including EEC/EC agreements)

<i>Dependent variable:</i>	
Number of Competition Policy Provisions	
Average Number of Provisions (pre-GE)	4.149*** (0.289)
Post-Global Europe Additional Provisions	1.788*** (0.658)
Observations	83
R2	0.083
<i>Note:</i> *p<0.1; **p<0.05; ***p<0.01	

Source: Compiled by the author.

With the vertical channel for policy export blocked, it appears that the EU has since opted for complementing the vertical policy promotion efforts with competition policy export and policy promotion through bilateral FTAs. FTAs are, like BECAs above, legally binding agreements, however, “competition chapters often do not have a binding character” and are “often excluded from dispute settlement in FTAs” (Demedts, 2015, pp. 426, 429). Nevertheless, especially in the case of association agreements, the EU has been able to leverage its bargaining power through trade to require “approximation of the competition rules of the associating country to the EU acquis” (Papadopoulos, 2010, p. 104).

EU Policy Export Through FTAs

In line with H1, a neofunctional approach would expect that where available, power-based bargaining between asymmetrically powerful partners would be a preferred mechanism for EU competition policy export. This is because for self-interested rational actors, export through trade agreements in which they can dictate binding conditions would be an expedient form for policy export. An example of such a direct policy export effect can be found in the EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA), which required the alignment of “competition law and enforcement practice” with that of the EU (Demedts, 2015, p. 424). Demedts emphasises that the requirement of such an alignment is a unique feature of the EU-Ukraine agreement and “cannot be found in other post-Global Europe FTAs” (Demedts, 2015, p. 425). However, the other DCFTA countries were also required to carry out legal and policy reform prior to the agreements’ conclusion. To illustrate, prior to the finalisation of the DCFTA, Georgia was required to “adopt new national legislation that would comply with EU rules” (Menabdishvili, 2015, p. 214).

With other DCFTAs being those concluded with Georgia and Moldova, the specific alignment requirement in the case of Ukraine is nevertheless consistent with H3. This is because H3 posits that policy export or promotion would be more likely with major trade partners and because Ukraine is the EU’s most important trade partner from the three countries above. Furthermore, bearing in mind the geopolitical situation that fuelled Ukraine’s pursuit of a closer association with the EU, it is apparent why the EU was able to use its bargaining power to externalise competition policy through the agreement. However, in the case of candidate countries, the leverage of the EU to export competition policy was even stronger. This is because the “accessing countries were required to align their legislation with the EU” through their association agreements, including in competition policy acquis (Boheim and Friesenbichler, 2016, p. 570).

EU Policy Promotion through FTAs

With countries that refuse EU policy export in bilateral negotiations, be it for reasons of relative power symmetry or lack of incentive, the EU would be expected to engage in policy promotion through its FTAs. An intermediate step between the case of policy export and policy promotion are the EU’s agreements with Mediterranean countries. To illustrate, Papadopoulos notes that “Euro-Mediterranean agreements are very similar to the provisions included in the agreements with candidate countries”, which are required to

align their legislation with that of the EU (Papadopoulos, 2010, p. 123). The commitment required in such agreements is that of best efforts to align with the EU *acquis*. However, Papadopoulos notes that there is a lack of publicly available information on the implementation of competition provisions in the agreements (Papadopoulos, 2010, p. 132). The requirement to align themselves with the legal framework of the EU corroborates H3, since such requirements correspond to an attempt to maximise spill-over effects towards geographically close and economically significant trading partners. Moreover, such requirements also reveal the EU's preference for power-based bargaining as posited by H1, since the agreements require alignment with EU *acquis* without conferring the prospect of membership.

A weaker form of EU policy promotion is present in cases of FTAs with distant, yet important trading partners. In the absence of significant relative economic power asymmetry, as in the case of Canada, policy promotion through FTAs blends with policy protection. This is noted by Lapr v te, who, based on the Comprehensive Economic and Trade Agreement (CETA) with Canada, observes that competition provisions in the agreement "combine and cumulate" the different jurisdictional approaches to competition policy (Lapr v te, 2019, p. 30). In combination with Bradford's observation that there appears to be no systematic favouritism of the EU's own companies in its application of competition law, the case of CETA points towards further incremental convergence in competition law across jurisdictions through an upgrading of common interests (Bradford, 2020, p. 105). In FTAs signed with developing or in-transition countries, the EU also includes an "offer of technical assistance [...] for the adoption and application of competition rules in the countries", which is clearly complementary to the objective of EU competition policy promotion (Papadopoulos, 2010, p. 134).

However, on closer inspection of the DESTA database, the latest included agreement (the EU-Vietnam FTA) contains only 4 competition provisions. The same number of provisions is also given in the case of CETA, which appears to contradict the logic underlying H1 and H3. This is because the variable of power asymmetry would lead us to expect a more extensive policy promotion in the case of the agreement with Vietnam. However, there appears to be a qualitative difference between the agreements, since as Lapr v te observes, the CETA provisions combine the two jurisdictions' "most advanced provisions" (Lapr v te, 2019, p. 30). Moreover, the contradiction can be explained with reference to the fact that DG Trade remains in charge of FTA negotiations and possibly pursued different objectives in the two FTAs (Demedts, 2018, p. 365).

While the goal of maximising spill-over effects through policy export aligns the preferences of DG Competition and DG Trade as per H3, DG Trade's obligation to consider issue linkages and concessions in the negotiations could lead to diverging outcomes in externalising its competition policy. The result does not lead us to reject H1, but to specify that even though power or rules-based bargaining remains a preferred mechanism for competition policy export, its effects are under certain conditions diluted.

Unilateral Adoption of EU Competition Law and Policy

In addition to horizontally interacting in competition policy, the EU also engages externally by virtue of its presence, allowing for “mimetic or normative isomorphism” (Papadopoulos, 2010, p. 202). Examples of incremental policy export towards third countries and regional organisations would constitute supporting evidence for the remaining unaddressed hypothesis H4.

From an analysis of a mapping exercise of RTAs provided by Teh, there are indications of trans-regional convergence. This conclusion follows because there are positive correlations between EU competition provisions in trade agreements and those of Australia, Canada and Chile which act as hubs for RTAs (Teh, 2011, p. 486). Papadopoulos supports this finding with reference to regional blocs, because although there is significant variation as to the obligations on individual members, regional agreements have followed the EU model more frequently than the rival model of NAFTA (Papadopoulos, 2010, p. 200). To illustrate, “the Andean Community, the Caribbean Community and Common Market, the Common Market for Eastern and Southern Africa and the Economic Community of West African States have opted for the creation of a supranational body equivalent to the European Commission” to supervise and apply competition rules (Papadopoulos, 2010, pp. 194-195). The fact that the regional blocs above as well as the East African Community include a “court competent to review the decisions of the regional authority” provides first-hand evidence of unilateral imitation of the EU approach to regionalisation of competition rules (Papadopoulos, 2010, p. 195). This constitutes direct supporting evidence for H4.

In addition to imitation by regional groupings, Bradford documents the phenomenon of legislative borrowing by individual countries. To illustrate such incremental policy export, Bradford provides the example of South Africa, whose “several areas of [...] competition law were modelled almost verbatim from EU legislation” (Bradford, 2020, p.115). This borrowing even included the case of internalising ECJ jurisprudence in addition to legislation. Moreover, Bradford notes that Singapore’s Competition Law of 2005, the Indian Competition Act of 2002, China’s 2008 Anti-Monopoly Law and Ecuador’s Organic Act for the Regulation and Control of Market Power emulate the EU competition law model (Bradford, 2020, pp. 116-119). Additionally, Khokhlov notes that Russian competition law “was significantly influenced by EU competition law” (Khokhlov, 2014, p. 32). All such instances provide direct evidence of incremental EU policy export.

As Bradford notes, however, many factors could have facilitated this legislative spill-over. The suggested factors include the proximity of legal traditions (as in the case of the UK and Singapore), linguistic proximity (as in the case of Ecuador and Spain) or historical connections (Bradford, 2020, pp. 120-121). These factors reduce the costs of adopting EU legislation, which is in line with the logic of neofunctional spill-over. This is because H4 would see competition authorities as rational actors minimising domestic costs of non-alignment of competition law with that of the EU. It is therefore possible that such individual effects are amplified by deeper structural similarities and differences between the economies, possibly along the lines of the Varieties of Capitalism typology (Hall and Soskice, 2001, pp. 8-14). A neofunctionalist view incorporating the opportunity to exploit the benefits of institutional complementarity would also help explain why the spill-over

effects have notably been absent from “countries that share common law traditions with the United States,” an archetype of liberal market economy (Bradford, 2019, p. 21).

The Case of EU External Engagement with the United Kingdom in Competition Policy

An interesting test-case for the pertinence of applying the neofunctionalist framework in this policy field is the future institutionalisation of external engagement in competition policy between the EU and the United Kingdom (UK). Given that the situation of withdrawal from the EU affords the United Kingdom an opportunity to reset its external engagement in competition policy according to its current policy preferences, H3 would lead us to expect that competition authorities would seek to maintain the close competition policy enforcement cooperation enjoyed by members of the European Competition Network. Moreover, because the UK remains a major trade partner of the EU, both a BECA and policy export through a legally binding trade agreement would be a predicted outcome of H3.

There is evidence that the UK might pursue a formal cooperation agreement that would be in some ways more extensive than the EU-Switzerland second generation enforcement cooperation agreement (House of Lords, European Union Committee, 2019).³ Moreover, from the institutional standpoint of rational, self-interested competition enforcement authorities of the European Commission and of the UK’s Competition and Markets Authority, close cooperation, both informal or formal would mitigate the negative effects of duplication of merger reviews, parallel investigations or antitrust enforcement, and other associated inefficiencies and uncertainties (Fingleton et al., 2017, p. 391, 409, 412).

Furthermore, Dabbah notes that the two agencies are “accustomed to cooperating with each other”, “share a fairly common ‘operational culture’,” and enjoy a mutual “impressive level of trust and confidence” on both “professional and personal terms” (Dabbah, 2020, p. 253). Such a description indicates that there is also an international setting facilitating persuasion, socialisation and learning effects, which H2 predicts would be favorable for EU policy promotion. Considering the fact that “a general feature of competition policy over the past two decades has been international convergence”, a neofunctionalist extrapolation would expect future competition policy relations between the UK and the EU to continue along a path of close cooperation enshrined in a deep BECA and through competition-related provisions in a trade agreement that would aim at mitigating future divergence between the two competition policy regimes (Vickers, 2017, p. S71).

Moreover, the EU’s insistence on maintaining ‘level playing field’ provisions as well as some form of regulatory ‘dynamic alignment’ within the negotiated trade agreement with the UK shows clear signs of attempted policy export (Armstrong, 2018, pp. 1108-1112). The importance of the EU’s external engagement on competition policy is further underscored by the fact that along with fishing rights, level playing field provisions are also a remaining obstacle to concluding a trade agreement between the two sides (Financial Times, 2020).

³ As of writing this working paper, the negotiations on future trade relations between the United Kingdom and the EU have not been concluded.

Given that the trade negotiations are an example of a rational political bargaining context, the EU's position of attempted policy export also corroborates hypotheses H1 and H2bis.

A no-deal scenario would not necessarily pose a counterexample to the neofunctionalist approach to explaining EU external competition policy engagement. This is because of two reasons. Firstly, the EU has clearly pursued a policy export strategy with regards to competition policy, which is in line with the strict ordering of preferences that prioritises policy export over policy promotion and hypotheses H1 and H2bis. Secondly, the neofunctionalist approach seeks to explain the mode of external engagement rather than to estimate each mode's effectiveness. Such a complementary analysis, however, is outside of the scope of this working paper.

Regardless of the outcome of the ongoing trade negotiations, the EU would nonetheless be expected to pursue a separate and extensive BECA because of the existing close cooperation relations between the European Commission and the UK's Competition and Markets Authority. The EU's external engagement in competition policy in the matter of the UK's withdrawal from the EU therefore appears to provide tentative support for a neofunctionalist interpretation. Nonetheless, the EU's future external engagement with the UK in competition policy is a fertile ground for further study that could more authoritatively evaluate the pertinence of applying a neofunctionalist model to explain the EU's external engagement in competition policy.

Conclusion

The neofunctionalist approach was argued to provide a convincing, dynamic explanation for the EU's external engagement by specifying the conditions under which the EU engages externally in competition policy. To test whether the neofunctionalist model correctly specifies the conditions under which the EU engages externally in competition policy, this working paper formulated explicit hypotheses linking the neofunctionalist independent variables to four modes of external engagement in the horizontal domain. Within the horizontal domain, the neofunctionalist approach was argued to explain cases of policy export to countries acceding to the EU as well as the reasoning for policy promotion through BECAs and FTAs. The approach also explains why such agreements are concluded primarily with major trade partners with reference to potential domestic cost reductions of non-alignment of competition law and the capacity to entail spill-over effects. Moreover, H3 also explains the logic behind engaging in policy promotion with major and strategic trading partners rather than engaging in policy export with economically less important trade partners.

The cases of accession and deep and comprehensive free trade agreements support H1 about the EU's preference for power-based bargaining for EU policy export. As predicted by H3, the EU has also sought to engage in policy promotion through BECAs and MoUs, and in both policy export and policy promotion in its FTAs with important trading partners. The diverging preferences and expectations of DG Trade, DG Competition, and those of the EU's trade partners were suggested as a causally relevant factor accounting for the variation in the inclusion of competition provisions in FTAs. There is significant evidence of

unprompted incremental EU policy export which can be explained with spill-over effects, as posited by H4. The evidence also presents the EU as a model for regional blocs and for individual countries' competition laws, and as a body able to unconditionally export policy to acceding countries.

Evidence from the DESTA database indicates that competition policy promotion has been increasingly permeating the EU's FTAs, with all post-Global Europe agreements including some provisions related to competition. In addition, the post-Global Europe agreements contain on average almost two more competition-related provisions than previous agreements, signalling a more committed and consistent approach to the externalisation of internal EU competition law and policy. This reflects a move towards more comprehensive agreements covering not only standard antitrust enforcement and mergers-related clauses, but also treatment of subsidies and state-owned enterprises.

The use of the framework of Müller, Kudrna and Falkner specifying four modes of EU external engagement revealed the difficulty in separating cases of policy promotion and policy protection in the case of the EU's BECAs and MoUs. This points to a possible under-specification of the modes of EU external engagement. This is because the two possible interpretations of BECAs as instances of policy promotion or policy protection cannot be clearly analytically separated until after the effects of the agreements become apparent.

Furthermore, additional validation of the neofunctionalist approach could be reached by examining counterfactual cases where policy promotion or policy export would be expected, but where it did not take place. Further research could also target the mechanism of intrainstitutional cooperation and FTA negotiation that leads to differing outcomes across the EU's FTAs. Further study could also consider the relative effectiveness of the four modes of external engagement in achieving the EU's objectives as well as a more extensive evaluation of the EU's external engagement with the UK in the field of competition law and policy.

To this end, the working paper briefly discussed the case of the United Kingdom's withdrawal from the EU. The presented neofunctionalist model was argued to expect the EU to engage in policy export before policy promotion through an FTA and a BECA. This expectation appears to be confirmed by the ongoing negotiations, which yields additional provisional support to the neofunctionalist approach. The presented signs of the UK's interest in an extensive BECA with the EU provide preliminary evidence of an upgrading of common interest in the case of efficient antitrust enforcement. However, in line with the neofunctionalist model, and bearing in mind that policy export appears politically unacceptable in the UK, the EU would be expected to resort to policy promotion in case policy export becomes unavailable as a mode of engagement. Finally, the absence of a dominant alternative amongst the variety of jurisdictions applying competition law and policy appears to uniquely predispose the EU to serve as a possible future node of policy convergence. Such a development in competition policy convergence could see the European project incrementally shift into European projection.

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Annex 1

For ease-of-replication purposes, this annex documents the RStudio software code used to generate the graph and table above.

#FTA Graph and Data

#Loading data from DESTA database

```
mydata  
read.csv2("https://www.designoftradeagreements.org/media/filer_public/49/f9/49f95666-  
accf-4290-9e67-36dc8b8ec923/competition_version_01_05.csv")
```

#Data manipulation lines for cleanup of irrelevant agreements:

```
Eudata <- mydata[grep("EC", mydata$name, fixed=TRUE), ]  
Eudata <- Eudata[grep("ECOWAS", Eudata$name, fixed=TRUE, invert=TRUE), ]  
Eudata <- Eudata[grep("African", Eudata$name, fixed=TRUE, invert=TRUE), ]  
Eudata <- Eudata[grep("Eurasian", Eudata$name, fixed=TRUE, invert=TRUE), ]  
Eudata <- Eudata[grep("SPARTECA", Eudata$name, fixed=TRUE, invert=TRUE), ]  
Eudata <- Eudata[grep("Caribbean", Eudata$name, fixed=TRUE, invert=TRUE), ]  
Eudata <- Eudata[grep("Organization", Eudata$name, fixed=TRUE, invert=TRUE), ]
```

#Adding binary variable for post-Global Europe Agreements

```
Eudata$postEUGE <- as.numeric(Eudata$year>=2006)
```

#Creating an aggregate variable for the number of competition provisions

```
SUMC <- cbind(Eudata$comp_not_distort,Eudata$comp_info, Eudata$comp_joint_committee,  
Eudata$comp_nat_autho,Eudata$comp_wg,Eudata$comp_coor_autho,Eudata$comp_com_a  
utho,Eudata$comp_monopoly,Eudata$comp_merger,Eudata$comp_ste,Eudata$comp_state_  
aid)
```

```
Eudata$Provisions <- as.numeric(rowSums(SUMC, na.rm=TRUE, dims = 1))
```

#Testing for statistically significant difference with a simple bivariate regression model

```
summary(lm(Provisions~postEUGE,data=Eudata))
```

```
model_1 <- lm(Provisions~postEUGE,data=Eudata)
```

#In generating the html table, use was made of the package stargazer by Hlavac, Marek,
#"stargazer: Well-Formatted Regression and Summary Statistics Tables", 2015.

```
library(stargazer)
```

```
stargazer(model_1, dep.var.labels = "Number of Competition Policy Provisions",  
covariate.labels = c("Average Number of Provisions","Post Global Europe Additional  
Provisions"), out = "LOCAL FOLDER DESTINATION", type = "html", no.space=TRUE,  
keep.stat=c("n", "rsq"), single.row=TRUE, intercept.top = TRUE, intercept.bottom = FALSE)
```

#Creating a plot of competition provisions

```
plot(y=Eudata$Provisions,x=Eudata$year,  
main="Development of Inclusion of Competition Provisions",
```

```
ylab="Competition Provisions in Agreements",  
xlab="Year of Conclusion",  
pch=20)  
#Superimposing a regression line  
abline(lm(Provisions~year,data=Eudata))  
#Checking data input manually for errors  
summary(Eudata$Provisions)  
summary(Eudata$postEUGE)
```




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