

Scientific Article

## **ACTORNESS OF THE EU IN MULTILATERAL RELATIONS EXAMINING THE CONCEPT OF GEHRING, OBERTHÜR AND MÜHLECK**

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### ABSTRACT

The article deals with the phenomenon of EU actorness and, replicating the study and testing the EU actorness model proposed by Thomas Gehring, Sebastian Oberthür and Marc Mühleck, questions why the EU is recognised as an autonomous actor by some international organisations but not by others. Gehring et al. link EU actorness to the type of competences it has in the respective policy areas of cooperation: in areas of exclusive competences full actorness is to be expected, and in areas of complementary competences, non-actorness. To test this assumption, two organisations – the World Intellectual Property Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) – are scrutinised. While the expectation in the case of WIPO was wholly confirmed, the cooperation of the EU with UNESCO required another explanation. The author reinterprets the reference model by adding an ideational component and conceptualising it by using three concepts: normative power and soft power approaches supplemented by the diffusion theory.

### **I. Introduction**

For a long time, states were considered – especially by such proponents of classical realism as Morgenthau – as the ontological starting point of the international political order. However, in the 1970s a paradigm shift occurred, since ‘the shift toward a system of mixed actors has ... reached a stage in which many new developments in the world system [were] difficult to explain satisfactorily in terms of orthodox assumptions and doctrines’.<sup>1</sup> Actorness research answers questions of whether and under which conditions international organisations, including the EU, evolve to additional autonomous centres of power. Actorness can here be defined as an international organisation’s quality of being an independent and self-reliant actor. Answering these questions leads to a better understanding of the nature and idiosyncrasy of a particular international organisation, which is especially relevant with regard to the EU and its wide-ranging international performance.

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<sup>1</sup> O. R. Young, ‘The Actors in World Politics,’ in J. N. Rosenau, V. Davis & M. East (eds), *The Analysis of International Politics*, New York: The Free Press 1972, p. 139.

EU actorness research established itself as a heterogeneous research field characterised by numerous concepts and approaches. One of the most conspicuous concepts seems to be the EU actorness model of Gehring, Oberthür and Mühleck (2013) due to its clear-cut structure and optimal operationalisation. The present paper replicates the findings of the study of Gehring et al. and tests the model's explanatory power by examining two cases that represent the relations of the EU with two international organisations: the World Intellectual Property Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The central element of the reference model is recognition of the EU 'as a participant in the process of decision-making about, and implementation of, co-operation agreements in addition to (or in place of) its Member States'<sup>2</sup> by a partner organisation which results from the EU's particular structural features based on the kind of competences (exclusive, shared or complementary) the EU has in an area of cooperation and generally designated by Gehring et al. as *action capability*. Following that, the present paper aims to find out to what extent action capability according to Gehring et al. (2013) is the single explanatory factor for recognition of the EU as a relevant actor by other international organisations and therefore for EU actorness.

In the following section, *State of the Art*, I propose my own categorisation of the relevant EU actorness concepts ordered into three groups of causal factors, namely structural, behavioural and external. Section III discusses in detail the EU actorness model of reference, elucidating its place in the categorisation suggested. I argue that focusing on structural factors limits the explanatory power of the model of reference. The empirical analysis of the two international organisations mentioned above occurs in section IV. Since, as the findings show, the explanatory power of the reference model can undoubtedly be confirmed in the case of WIPO, but not in the case of UNESCO, a reinterpretation of the EU actorness reference model is proposed in the last section. I reframe the notion of *action capability* applied by Gehring et al. as a source of the EU's regulative (legislative) power by adding an ideational component to it and I explain how to conceptualise it by discussing three concepts: *normative power*, *soft power* and *diffusion theory*.

## I. State of the Art

The origin of actorness research was the concept proposed by Cosgrove and Twitchett in 1970, which provided the very first framework for conceptualising actorness of the European Economic Community (EEC), defining it as 'capacity to act on the global scene'.<sup>3</sup> Currently, EU actorness research remains highly fragmented due to the ambiguity of its key definitions and content.<sup>4</sup> Whereas most EU actorness concepts rest upon a state-centric ontology of international politics and, hence, assign a marginal role to this institution, some authors recognise its feedback effect, i.e. the influence that the EU has on the international community. In order to bring a terminological clarity into this highly heterogeneous research field, a new categorisation of relevant EU actorness concepts based on three groups of actorness factors is

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<sup>2</sup> T. Gehring, S. Oberthür & M. Mühleck, 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in Some International Institutions, but Not in Others', *Journal of Common Market Studies* 2013- 51(5), p. 875.

<sup>3</sup> C. Cosgrove & K. J. Twitchett, *The New International Actors: The United Nations and the European Economic Community*, London: Macmillan 1970, p. 12.

<sup>4</sup> K. Urbanski, 'The European Union as an Actor in the Field of International Sanctions. An Investigation of the Conceptual Principles and Mechanisms of Emerging Actorness' (doctoral dissertation), Bamberg: Otto-Friedrich-Universität Bamberg 2018, p. 18.

proposed, namely structural, behavioural and external factors. Due to space constraints, the proposed list of factors is not a complete one. However, it provides a suitable theoretical framework both for answering the research question of the present paper and for future research.

## II.1 Structural factors

Factors of the first group result from the nature of the EU's structure. Actorness is given if particular structural features are in place. What is more, structure is comprehended not only as a material quality, for instance as a source of EU power resources in a certain policy area, but idealistically as involving such determinants as norms and values as well. The most relevant factors of this group – let us call them “structural factors” – are *cohesion*, *capability* and *consistency*. Since only the factor *capability* is relevant for the Gehring et al. EU actorness model, the following discussion will focus only on the latter one, omitting the other factors *cohesion* and *consistency*.

Most extensively addressed by Rhinard and Sjöstedt, the factor *capability* consists of two elements. On the one hand, *capability* is understood as ‘availability of instruments to influence the behaviour of EU partners in a sense of resources ..., which could range from diplomatic tools to aid mechanisms, and from military missions to trade agreements’.<sup>5</sup> As already mentioned, the reference study by Gehring et al. (2013) relies on this materialistic understanding of power, defining (*action*) *capability* as ‘control over a significant amount of governance resources’, which in the case of the EU involves the scope of competences transferred to it from member states.<sup>6</sup> Despite the many strengths of the concepts of Hill and Sjursen and of Gehring et al., this approach to EU governance capabilities based on transferred power does not appear to be new. In fact, it had been partially applied by Allen and Smith (distinction between the EU's domestic *legitimacy* and *capability* of resources as internal factors and the external factor of *reputation* towards EU partners) and by Jupille and Caporaso, who term the same element *autonomy* (‘internal legal authority to act’).<sup>7</sup> Urbanski places the factor *capability* in a more general manner in the holistic policy circle – which in hindsight seems to be justified – and makes a general conclusion that ‘the more stages of the policy circle that are based on resources from a common pool, the more actorness an international organisation acquires in a specific policy area’.<sup>8</sup>

## II.2 Behavioural factors

While structural factors reflect the static nature of the EU and can be readily theorised by, for instance, examining the scope of competences transferred from member states to the EU, more empirically oriented research is required if behavioural factors are to be analysed. The concept of *performance* and *impact* propounded by Rhinard and Sjöstedt is probably the most prominent

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<sup>5</sup> M. Rhinard & G. Sjöstedt, ‘The EU as a Global Actor: A new conceptualisation four decades after ‘actorness’’, *UI Paper* 2019-6, p. 7.

<sup>6</sup> Gehring, Oberthür & Mühleck 2013, *supra* note 2, p. 853.

<sup>7</sup> J. Jupille & J. A. Caporaso, ‘States, Agency, and Rules: The European Union in Global Environmental Politics,’ in C. Rhodes (ed.), *The European Union in the World Community*, Boulder: Lynne Rienner Publishers, Inc. 1998, p. 3.

<sup>8</sup> Urbanski 2018, *supra* note 4, p. 25.

illustration for this still somewhat under-conceptualised group of factors. For them, performance means ‘the kinds and quality of transactions originating from the EU system carrying a potential to shape addressees in the external environment’.<sup>9</sup> Compared with the earlier concepts, the latter goes one step further, highlighting concrete EU strategies to promote its agenda in relations with partner organisations and not only making an “assumption of action” as, for instance, Bretherton and Vogler did. According to Rhinard and Sjöstedt, the EU possesses a wide range of tools to affect the behaviour and frequently the intentions of its partners, which they describe as *transactions* that involve knowledge transfer, the threat of sanctions, prospects of military assistance etc. Some of these measures need to be introduced by the EU despite resistance from some member states. Hence, transactions are the operationalisation of the factor *performance*.

The factor *impact* completes the logical chain of ‘potential to act – intention – performance – impact’. Rhinard and Sjöstedt operationalise *impact* through three approaches: (1) impact as policy output (i.e. ‘the more collective policies generated from the EU, the more its impact on the international stage’), (2) impact as broadly interpreted efficiency (i.e. ‘if the EU has modest ambitions and meets them, does that demonstrate global impact?’) and finally (3) a flexible contextual approach to impact expressed as ‘setting the agenda of international labour policy’, ‘shaping a section of a treaty’ or ‘serving as an honest broker’.<sup>10</sup> The benefit of the actorness model of Rhinard and Sjöstedt is that it provides a clearly designed algorithm to evaluate the success or failure of cooperation between the EU and its partner organisations. In detail, EU actorness is not only being related to a certain policy area (as does the structural factors based analysis), but is regarded as a situational attribute of the EU that is dependent on its reasonable action. However, a further conceptualisation is required as to which factors immanent to the partner organisation support or inhibit successful EU performance.

### II.3 External factors

The last group of factors detected are external factors, which as such cannot be influenced by the EU itself. Some researchers stress the relevance of focusing on the external environment since ‘what is ultimately decisive is how other actors perceive ... developments’ in the internal capacity of the EU.<sup>11</sup> Bretherton and Vogler place external factors in the tradition of social constructivism, thereby conceptualising global politics ‘in terms of the process of social interaction in which actors engage’.<sup>12</sup> These interactions, no matter how formal or informal they are, ‘shape the evolution of actors’ identities and provide contexts within which action is constrained or enabled’.<sup>13</sup>

The meta-dimension of interaction relates to the level of discourse and to the ‘external context of ideas and events that enable or constrain actions’, acting as a framework or system of reference in which the EU is anchored.<sup>14</sup> Taking this as a starting point, Bretherton and Vogler call the respective factor *opportunity*, which correlates with EU’s growth or decline as a global

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<sup>9</sup> Rhinard & Sjöstedt 2019, *supra* note 5, p. 15.

<sup>10</sup> Rhinard & Sjöstedt 2019, *supra* note 5, p. 19.

<sup>11</sup> C. Hill, M. Smith & S. Vanhoonacker, *International Relations and the European Union*, 3rd edition, Oxford: Oxford University Press 2017, p. 5.

<sup>12</sup> C. Bretherton & J. Vogler, *The European Union as a Global Actor*, 1st edition, London: Routledge 1999, p. 29.

<sup>13</sup> *Ibid.*

<sup>14</sup> C. Bretherton & J. Vogler, ‘A global actor past its peak?’ *International Relations* 2013-27(3), p. 378.

actor. As European integration started, two major world system factors supported the dominance of the USA and therefore impeded EU actorness: the Bretton Woods system and the bipolarity of the Cold War. The situation changed during and after the collapse of the Bretton Woods system in the 1970s and the rise of the economic interdependence theory that posited sovereign states as vulnerable to exogenous economic powers. Consequently, the EU came to be regarded as an example of how to deal with external pressure and risks. For its part, the evolution of discourse from interdependence towards globalisation fitted well with the EU's neoliberal orientation as a supranational actor and its ability to strike a balance between de-territorialised international actors and sovereign states. This evolution prompted the then commissioner for commerce Peter Mandelson to state that 'the European Union gives us the potential to shape globalisation positively in ways even the largest of our nation states cannot achieve on their own ... which makes the EU a uniquely capable intermediate player'.<sup>15</sup> However, years of economic crisis and the rise of China have led to an essential loss of the EU's influence and authority.<sup>16</sup>

Additionally, some authors – including those of the study of reference – start their analysis by contemplating the EU from the perspective of its partner organisations. This external factor, *recognition*, reflects 'outsider's acceptance of EU competence' in a particular policy area relevant for cooperation.<sup>17</sup> It is questionable whether *recognition* can be regarded as an autonomous factor since even if it has been attained, i.e. if the partner organisation does recognise the EU as an actor, a degree of uncertainty regarding its concrete reasons for doing so remains. This means that a possible explanation can again be found by examining all the other structural and behavioural factors mentioned above. Nonetheless, the reason for identifying *recognition* as a separate factor is that such a distinction does not presuppose actorness only when some structural and/or behavioural factors are in place, as the EU actorness models previously discussed do, but rather stimulates further efforts to find independent variables causal for *recognition* after *recognition* has been detected – and it is a perfect scheme for finding new explanations.

In the next section, I will present the EU actorness model put forward by Gehring, Oberthür and Mühleck in 2013 based on the abovementioned categorisation of EU actorness factors.

<b>Factors</b>	<b>Characteristic features</b>	<b>Scientists</b>
Structural factors	<ul style="list-style-type: none"> <li>- internal features (norms, preferences, policy and procedural cohesion)</li> <li>- structural capacities to act (<i>capability</i> and <i>action capability</i>)</li> <li>- <i>consistency</i></li> </ul>	Bretherton & Vogler 2006; Conceição-Heldt & Meunier 2014; Gehring, Oberthür & Mühleck 2013; Hill 1996; Jupille & Caporaso 1998; Koops 2011; Sjöstedt 1977, 1998; Thomas 2006; Urbanski 2018

<sup>15</sup> P. Mandelson, 'Europe's response to globalisation: where does EU trade policy go from here?' at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_06\\_274](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_06_274) (accessed on 25 December 2020).

<sup>16</sup> Bretherton & Vogler 2013, *supra* note 14, p. 379.

<sup>17</sup> R. H. Ginsberg, 'Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap', *Journal of Common Market Studies* 1999-37(3), p. 447.

Behaviouristic factors	- particular practical realisation of the structural capacity to act	Bretherton & Vogler 2006; Rhinard & Sjøstedt 2019
External factors	- international recognition and authority immanent to the EU ( <i>recognition</i> ) - international environment and discourse - internals of partner organisations	Bretherton & Vogler 2006; Delreux 2014; Gehring, Oberthür & Mühleck 2013; Jupille & Caporaso 1998

**Table 1** *Three groups of EU actorness factors (author's categorisation)*

### III. EU Actorness Model of Gehring, Oberthür and Mühleck (2013)

Two factors are relevant for Gehring et al. 2013: *action capability* and *formal membership*. The expectation of the reference model is that governance resources and autonomy in goal formation which the EU has or does not have in a particular field of cooperation (*action capability*) is causal for EU actorness in multilateral relations, but its formal membership of the partner organisation is not.

The point of departure is the external factor *recognition* of the EU by the partner organisation 'as a participant in the process of decision-making about, and implementation of, co-operation agreements in addition to (or in place of) its Member States'.<sup>18</sup> The variable *recognition* is operationalised by three indicators, which are: (1) involvement of the EU in negotiations within and under the auspices of the partner organisation, (2) willingness to accommodate EU preferences within institutional decisions and international agreements and (3) attempts to commit the EU in order to enhance the prospects of successful governance activities.<sup>19</sup>

As already mentioned, this operationalisation enables a rather straightforward practical application of the model insofar as *recognition* can be detected in an undemanding but reliable way which facilitates testing the hypothesis and a further search for probable explanation variables. If all three indicators are backed with facts, recognition can be affirmed, and if not, for instance when EU preferences were not taken into account by the partner organisation, we have *non-recognition* according to the terminology of Gehring et al.

The authors explain the presence of *recognition* through the structural factor (*action*) *capability* (also called *actor capability* and *capability to act* in the reference text). Grounded on the theory of international institutions of Koremanos et al. (2001), Gehring et al. consider *action capability* as present if 'the EU is capable of contributing to an international co-operation project separately from its Member States'.<sup>20</sup> Action capability is constituted by two elements. The first element is *control over a significant amount of governance resources* (below: *control*) and relates to the EU's ability to 'constrain, orchestrate or in other ways shape and influence the behaviour of relevant actors

<sup>18</sup> Gehring, Oberthür & Mühleck 2013, *supra* note 2, p. 854.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Idem*, p. 850.

in its environment'.<sup>21</sup> In essence, variable *control* depends on the scope of the EU's legislative power, i.e. the scope of power transferred to the EU from its member states in a particular policy area. It is expected that the EU possesses more governance resources in the areas of exclusive competences than in those of complementary competences. Although Gehring et al. mention financial resources together with legislative power as the EU's potential governance resource, this element has not been further scrutinised despite its seeming relevance in a number of cases.

Similarly, the second constitutive element of action capability, *autonomy in goal formation* (below: *autonomy*), is not discussed in the study of reference, even though it has been given a clear-cut definition. It primarily derives from 'established policies [within the EU] that reflect institutionalised knowledge on how to improve a given area of international relations'.<sup>22</sup> The highest level of autonomy is to be expected in the areas of Community responsibilities. That being so, the signifier seems to be at odds with the signified since the wording "autonomy in goal formation" suggests that the EU should be capable of defining its political goals and tasks autonomously from member states. Nevertheless, even this assumption appears to be misleading since – as I will show later – the so-called negotiation directives, which in fact prescribe goals for the EU in negotiations with partner organisations, are in normal practice determined by the Council and not by the Commission, i.e. by the entity assembled from Member States' representatives and otherwise strongly associated with the intergovernmental policy areas. In accordance with this argument, some uncertainty remains concerning whether such a monopolistic goal formation competence of the Council really means autonomy in goal formation in the sense used by Gehring et al. Probably, it is exactly this dichotomy which is the real reason that *autonomy* is not further scrutinised in the study of reference.

On the contrary, formal membership of the EU in the partner organisation is not considered relevant for EU actorness. Gehring et al. examine this hypothesis (only action capability is causal for EU actorness) in six case studies which relate to six possible constellations of two variables linked with three types of EU competences, namely executive, shared and complementary. While the variable *formal membership* varies between **yes** and **no**, the variable *action capability* has three gradations: **high** where the EU has exceptional competences, **selective** for shared competences and **low** for complementary competences. For each constellation, one cooperation partner, e.g. international organisation or international regime, is selected (see Table 2).

The flaw in this selection of cases by Gehring et al. consists in ignoring differences between international organisations (FAO, IMF, WHO and WTO) and regimes (CITES and LRTAP). First of all, in comparison to international regimes, international organisations possess their own actorness and are in most cases legally recognised by international law as subjects. By contrast, international regimes are merely cooperation tools, the nature of which barely goes beyond the cumulative interests of their member states.<sup>23</sup> The primary goal of international regimes is to establish particular shared rules and to reduce transaction costs for participants.<sup>24</sup> A possible explanation for disregard of this difference is an underlying (erroneous) assumption that the nature of partner organisations does not matter. However, such an assumption contradicts the argument of Conceição-Heldt and Meunier (external factor *bargaining*

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<sup>21</sup> *Idem*, p. 852.

<sup>22</sup> *Ibid.*

<sup>23</sup> V. Rittberger, B. Zangl & A. Kruck, *Internationale Organisationen*, 4th edition, Wiesbaden: VS Verlag für Sozialwissenschaften, 2013, p. 124.

<sup>24</sup> *Ibid.*

*configuration*). Moreover, it seems more proper for reasons of analytical clarity to subdivide the analysis of EU actorness into actorness in relations with international organisations and cases where the EU is a party in an international regime since only few international regimes exist as autonomous bodies. Most regimes are led by other international organisations and therefore constitute only one episode in the history of the EU's relations with that organisation. Problems arise if the EU is a party in one international regime led by a particular international organisation but not in the others, because the research results would contradict each other depending on whether this regime is taken separately (actorness) or as a part of all possible cooperation forms provided by this organisation (non-actorness).

In order to circumvent this flaw, the present paper focuses on international organisations only. In accordance with the controlled comparison method by George and Bennet (2005), constellations 2 and 4 from Table 2 are considered as the most relevant. Subsequently, the alternative explanatory factor *formal membership* is kept constant and only the explanatory factor to be tested (*action capability*) is varied.

		Formal membership in an international institution	
		Yes	No
EU action capability in the domain of an international institution	High	1. Full actor (WTO)	2. Full actor (CITES)
	Selective	3. Selective actor (FAO)	4. Selective actor (WHO)
	Low	5. Non-actor (LRTAP)	6. Non-actor (IMF)

**Table 2** *Graphic presentation of case selection in the reference study*<sup>25</sup>

Table 3 shows the cases selected for the present research. It is suitable for clarifying whether an additional explanation is necessary, for instance if *recognition* and therefore *actorness* have been detected in constellation 4 contrary to the expectation of the EU actorness model of Gehring et al. (2013).

**For constellation 2** *high action capability/non-membership*, I have selected the World Intellectual Property Organization (WIPO). The EU is not a member (*non-membership*), while foreign trade policy is an exclusive EU competence in accordance with Article 3 and Article 206f TFEU and especially in the area of intellectual property pursuant to Article 11b TFEU. Accordingly, the EU possesses a *high action capability* in line with the EU actorness model of Gehring et al. (2013). Currently, the EU is party to three WIPO-administrated agreements, namely: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled; Beijing Treaty on Audiovisual Performances; and the Geneva Act

<sup>25</sup> Gehring, Oberthür & Mühleck 2013, p. 854.

of the Lisbon Agreement on Appellations of Origin and Geographical Indications. Since the EU participated in negotiations prior to conclusion of all these treaties and finally became a party to them (indicators 1 and 3 of the *recognition* variable according to the model of Gehring et al. [2013]), examination is needed of the extent to which WIPO was willing to accommodate EU preferences within the treaties (indicator 2 of the *recognition* variable).

**For constellation 4 *low action capability/non-membership***, I have selected the United Nations Educational, Scientific and Cultural Organization (UNESCO). The EU is not a member, but has complementary competences in almost all UNESCO policy areas (exceptions: science policy, shared competences). The expectation according to Gehring et al. (2013) should be low action capability and non-actorness. Nonetheless, the recognition indicators testify a presence of *recognition*: the EU is a party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (indicator 3) and was involved in the negotiations on the eve of the conclusion of the Convention (indicator 1). Hence, examination is needed of whether UNESCO was willing to accommodate EU preferences within the Convention (indicator 2). If so, *recognition* and *actorness* are widely affirmed and an additional explanation is required.

		Formal membership in an international institution	
		Yes	No
EU action capability in the domain of an international institution	High	1. Full actor	2. Full actor (WIPO)
	Low	3. Non-actor	4. Non-actor (UNESCO)

**Table 3** *Graphic presentation of case selection for the present study*

#### IV. Empirical Analysis

Based on the framework established by Gehring et al. (2013), the following empirical analysis consists of three steps. First, a set of key data on the four selected treaties mentioned above is provided. In a second step, the EU's status during the negotiations is discussed (indicator 2). The last step aims to ascertain whether and to what extent EU preferences defined in negotiation directives by the Council were accommodated within the final texts of the treaties (indicator 2).

Before the empirical analysis starts, the legal basis for EU action in cooperation with international organisations should briefly be addressed. The legal basis for the recognition of the EU as a subject of international law (legal personality) is anchored in Article 47 TEU. Cooperation with international organisations in areas where the EU possesses implicitly conferred powers is strongly supported, especially with the UN and its special organisations according to Article 220 TFEU. Furthermore, the so-called "cultural clause" (Article 167 TFEU) explicitly obliges the EU to cooperate with all international organisations responsible

for culture (Article 167, paragraph 3). Since the particular modality of cooperation is not determined in the Treaty, the EU enjoys a certain degree of autonomy when designing its multilateral cooperation.<sup>26</sup> More relevant is that the EU has competences to conclude international treaties if the scope of this treaty does not transgress the scope of the EU's inner competences in the respective domains (Article 216 TFEU).

The contracting procedure in accordance with Article 218 TFEU distinguishes between negotiating and concluding the treaty. At the start of the procedure, the Commission recommends the Council start negotiations, whereupon the latter authorises the Commission by issuing a special negotiating mandate as a Decision.<sup>27</sup> In this Decision, the Council appoints a chief negotiator, who is traditionally, but not compulsorily, a member of the Commission. In addition, the Council ordains negotiation directives that the chief negotiator must strictly follow. It is also the Council that decides in a separate Decision whether a treaty should finally be signed by the EU. In some exceptional cases of exclusive competences, the Commission has so-called treaty-making powers and sole responsibility for concluding treaties.

If a treaty contains both intergovernmental and supranational elements, the Council's primary goal is to avoid competence collisions between the EU and member states. In the case of such a "mixed agreement", negotiations are led both by representatives of the Union and member states in such a way that the internal demarcation of powers remains invisible to the negotiating partners.<sup>28</sup>

In the overwhelming majority of international organisations only states can obtain formal membership. In particular cases, the GATT for instance, this clause was abolished on the initiative of EU member states and against the will of some GATT members. In other cases, however, including WIPO and UNESCO, the limitation has continued to exist. Against this legal background, an empirical analysis of two of the abovementioned international organisations is to be conducted.

## IV.1 WIPO

In its modern form, WIPO has existed since 1970 and has had the status of a UN special organisation since 1974. Its primary goal is 'to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organisations'.<sup>29</sup> Close cooperation with WIPO is important for the EU and its economy since the total number of jobs in industries connected with intellectual property such as the creative and pharmaceutical industries amounted to 27.8% of all jobs within the EU, or 60 million people, in the period from 2011 to 2013. These industries produced more than 42% of the EU's GDP (in absolute numbers: EUR 5.7 billion).<sup>30</sup>

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<sup>26</sup> R. Bieber, A. Epiney, M. Haag & M. Kotzur, *Die Europäische Union: Europarecht und Politik*, 12<sup>th</sup> edition, Baden-Baden: Nomos 2016, p. 645.

<sup>27</sup> In some policy areas such as CFSP, which are irrelevant for the present paper, the procedure can vary.

<sup>28</sup> Biebe, Epiney, Haag & Kotzur 2016, *supra* note 26, p. 650.

<sup>29</sup> 1967 Convention Establishing the World Intellectual Property Convention, Article 3.

<sup>30</sup> T. Perišin, 'World Trade Organization: The EU's influential role in global trade policy,' in R. Wessel, & J. Odermatt (eds), *Research Handbook on the European Union and International Organizations*, Northampton: Edward Elgar Publishing, 2019, p. 277.

In areas of competence of WIPO, the European Union has exclusive power and, therefore, *high governance resources* according to the EU actorness model of Gehring et al. (2013). Since the WIPO statute allows only states to join it, the second criterion of Gehring et al.'s model, *non-membership*, is also fulfilled. That means that the Union has no formal voting right in WIPO's organs, e.g. General Assembly, Coordination Committee and Conference. Nonetheless, the record shows a lively informal collaboration of the EU in meetings and *ad hoc* panels and groups (for instance, Working Group on the Legal Development of the Hague System for the International Registration of Industrial Designs or Working Group on the Legal Development of the Madrid System for the International Registration of Marks). This cooperation is based on the working agreement which additionally allows information exchange between both organisations. The *de facto* status of the EU within WIPO varies somewhere between a member without voting rights and a privileged observer.<sup>31</sup>

As already shown, the Union is party to three WIPO-administered treaties and the conclusion of each was preceded by a diplomatic conference conducted in line with specially agreed *Rules of Procedure* and attended by the EU. The diplomatic conference towards the Marrakesh Treaty was held in June 2013 in Marrakesh. In essence, it is 'the first international treaty, which provides for minimal standards for exceptions to copyright, that is, it gives users rights'.<sup>32</sup> *Inter alia*, the Treaty obliges its signatories to adapt their domestic intellectual property rights (IPR) laws to the needs and concerns of visually and reading-disabled persons by introducing particular exceptions limiting the rights of intellectual property owners. For the first time, the rights of people commonly prevented from consuming a wide range of visual works of art – chiefly books – became protected by international law by restraining the monopoly of IPR owners on reproducing their works and making them available to the public.

The Beijing Treaty was adopted on July 24, 2012 at the diplomatic conference in Beijing. It represents a long-term compromise between great powers and their divergent interests.<sup>33</sup> The United States was the *primum mobile* of negotiations aiming to protect American film producers on the European market. The agreement grants fully-fledged legal protection to musicians, actors and dancers in step with technical advancements in sound and visual recording and broadcasting. However, it cannot be considered as complete, as some, if not the most controversial, areas of disputes between performers and producers are not addressed and are instead "outsourced" to national lawmakers.

The Geneva Act is an additional protocol to the Lisbon Agreement on Appellations of Origin and Geographical Indications 1958. The most relevant supplement brought in by the Geneva Act was the possibility for the EU to become a party to the Agreement, which was concluded at the diplomatic conference in Geneva on May 21, 2015. It stipulates common standards on and protection of geographical indication and designation of origin of wares, i.e. 'the names of places used to describe an agricultural or handcraft product originating in that location, which possess a specific quality or other characteristics attributed to that geographical origin'.<sup>34</sup> The

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<sup>31</sup> *Idem*, p. 280.

<sup>32</sup> C. Oppenheim, 'The Marrakesh Copyright Treaty for those with visual disabilities and its implications in the European Union and in the United Kingdom', *The Journal of National and International Library and Information issues* 2017-27(1), p. 5.

<sup>33</sup> A. Fellmeth, 'The Beijing Treaty on Audiovisual Performances', *International Legal Materials* 2012-51(6), p. 1211.

<sup>34</sup> A. Micara, 'The Geneva Act of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration: An Assessment of a Controversial Agreement', *Max Planck Institute for Innovation and Competition* 2016-47, p. 673.

key conflict during negotiations reflected the deep cultural division between Old Europe and the New World (which goes back to the French concept of *terroir* which connects certain qualities of production to a particular region) and the more universal *made in* approach common to Australia, Canada, New Zealand and the USA. Unsurprisingly, the EU attached great importance to anchoring protection of geographic indications in the treaty.

In all three cases, the EU participated in negotiations with a *special delegation* status granted by the *Rules of Procedure*. This status privileged the Union over other non-state members, giving it in many respects the same rights as member states, for instance because the ‘references in ... Rules of Procedure to Member Delegations [States] ... [are] considered – with few exceptions – as references also to the Special Delegations’.<sup>35</sup> To some extent, its bargaining power was weakened in all three cases since some WIPO member states refused to grant it its own voting rights.<sup>36</sup> However, a compromise in the form of so-called “proxy voting” was reached, which meant that the EU could vote in lieu of its member states if they do not exercise their voting rights themselves and if the total number of votes cast by the EU does not exceed the total number of its member states present at the diplomatic conference in question.<sup>37</sup> Hence, conditions described in *recognition* indicator 1, *involvement of the EU in negotiations within and under the auspices of the partner organisation*, are fulfilled. Since the EU finally became a party to the respective treaties in all three cases, indicator 3 also alludes to *recognition* by WIPO of the EU as an actor. Examination is still needed to ascertain whether the EU’s preferences were incorporated into the treaties (indicator 2).

At the start of the working process towards the Marrakesh Treaty, five agreement proposals were discussed, among them proposals from Brazil, Chile, the African Group, the European Union and the USA. The main differences of opinion reflected the global north-south divide:

‘While the Brazilian and the African Group’s proposals [were] aligned to a large extent, and [sought] to harmonize the law on exceptions and limitations for the benefit of the VIP [visually impaired persons], thereby creating a mandatory obligation among contracting states, the US and the EU submitted more limited and non-binding legal instruments.’<sup>38</sup>

On the eve of the diplomatic conference in Marrakesh, the European proposal was precluded and the Brazilian proposal for a more binding international legal regime subsequently adopted.<sup>39</sup> This failure compelled the Council to set less ambitious goals for the Commission as the EU’s single representative during the diplomatic conference. Its primary goal was to make sure the future agreement would be congruent with the EU *Directive on the harmonisation of*

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<sup>35</sup> F. Bontekoe, & M. Wallot, ‘World Intellectual Property Organisation (WIPO): ‘The growing presence of the EU in formulating international intellectual property law,’ in R. Wessel & J. Odermatt (eds), *Research Handbook on the European Union and International Organization*, Northampton: Edward Elgar Publishing, Inc. 2019, p. 282.

<sup>36</sup> E. Kwakwa & A. Talbott, ‘The Influence of the World intellectual Property Organization on the European Union,’ in R. Wessel & S. Blockmans (eds), *Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (First Edition), The Hague: T.M.C. Asser Press 2013, p. 203.

<sup>37</sup> WIPO Rules of Procedure, Diplomatic Conference on the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (MVT), Marrakesh: WIPO 2016, Rule 33(2); 2012, Rules 33(2) and (3); 2015, Rules 33(2).

<sup>38</sup> I. Nwakno, ‘Proposed WIPO Treaty for Improved Access for Blind, Visual Impaired, and Other Reading Disabled Persons and Its Compatibility with TRIPS Three-Step Test and EU Copyright Law’, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 2011-2, p. 4.

<sup>39</sup> S. Frankel, *Is Intellectual Property Pluralism Functional?*, Northampton: Edward Elgar Publishing, Inc. 2019, p. 321.

*certain aspects of copyright and related rights in the information society* 2001/29/EC and in particular that it (a) does not go beyond the exceptions and limitations which are necessary for enabling visually impaired and print-disabled persons to have access to copyright works on an equal basis with others; (b) complies with the three-step test obligations provided for in international agreements; (c) establishes that the distribution and making available of accessible format copies is limited to visually impaired and print-disabled persons; and (d) takes into account the availability of accessible format copies in the market.<sup>40</sup>

These moderated goals and thereby the condition of indicator 2, *willingness to accommodate EU preferences within institutional decisions and international agreements*, can be regarded as having been met. Article 11 of the Marrakesh Treaty stipulates that exceptions and limitations required to protect visually impaired persons ‘must be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or right holder’ (goal “a”).<sup>41</sup> So too was the so-called three-step system incorporated into the treaty, which represents a special mechanism to examine the reasonableness of IPR restrictions and consequently protects creators. Since WIPO applied a completely different mechanism in its previous agreements, it is undoubtedly an accomplishment of the EU that the three-step tool was finally adopted (goal “b”).<sup>42</sup> Moreover, the target group of the Marrakesh Treaty is blind and visually impaired persons and even if no data is available as to whether there were proposals to widen the treaty’s scope by including other groups, this target corresponds with goal “c”. Finally, Article 4 paragraph 1(a) allows contracting parties to restrict IPR in order to enable the availability of accessible format copies in the market by eliminating barriers in a cross-border circulation of artworks under consideration of the abovementioned three-step procedure (goal “d”).

In the case of the Beijing Treaty, disagreement between the EU on the one side and the USA and India on the other caused a ten-year break in negotiations. The key obstacle was the USA’s intention to incorporate a clause that allows an automatic transfer of rights from performers to producers by audio-visual performances. The conflict stemmed from deep-seated differences in the working cultures of both great powers. Whereas the USA aimed to strengthen the market position of film producers, which can be explained by its traditional preference for temporary service contracts, the EU pursued the strategic goal of introducing fully-fledged legal protection of artists and those involved in the cultural sector.<sup>43</sup> Only in 2010 could the European Union and the United States agree upon an open solution that leaves the Treaty’s parties a measure of leeway for individual legal decisions.

Given that the general compromise had already been achieved at the first negotiation phase, only few negotiation directives were ordained by the Council before the second round. The Commission was authorised ‘to conduct the negotiations in consultation with the special committee designed by the Council to assist it, in such a way as to ensure that the planned provisions are compatible with Directives 93/83/EEC, 2001/29/EC,<sup>44</sup> 2006/115/EC and

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<sup>40</sup> Council of the European Union, Council Decision on the participation of the European Union in the negotiations for an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons, adopted 12 November 2012, 16259/12.

<sup>41</sup> M. Senftleben, ‘A Copyright Limitations Treaty Based on the Marrakesh Model: Nightmare or Dream Come True?’, *SSRN* 2017, p. 5.

<sup>42</sup> Nwakwo 2011, *supra* note 38, p. 207.

<sup>43</sup> Fellmeth 2012, *supra* note 33, p. 1211.

<sup>44</sup> See the chapter on the Marrakesh Treaty above.

2006/116/EC'.<sup>45</sup> A collaborating special committee was involved due to shared competences in certain matters covered by the Treaty. Nonetheless, this circumstance posed no obstacle to full implementation of the Council's guidelines. The correspondence of the Treaty with the EU norms listed above is so clear that some authors concluded that EU member states 'will not have to adapt their national laws, since they already incorporate the substance of the treaties in national law'.<sup>46</sup> Consequently, the third indicator according to the EU actorness model of Gehring et al. (2013) also points to recognition of the EU by WIPO.

By contrast, in the case of the Geneva Act, the Council guidelines were precisely worded:

- Improve and modernise the legal framework of the Lisbon system so as to make it more attractive to prospective new members, including EU member states;
- Safeguard the level of protection granted to appellations of origin by the current agreement and extend it to geographical indications;
- Specify and clarify the rules of the Lisbon system as regards application for, and validity of, international registrations, protection and refusal of the effects of international registrations; in particular, the negotiators shall support joint applications in the case of a trans-border geographical area (Article 5), aim at the highest level of protection (Article 11) and at a high-level protection against becoming generic (Article 12), refuse prevalence of prior trademarks (Article 13), support the possibility of granting a phasing-out period for discontinuing prior use of geographical indications or appellations of origin (Article 17) and clearly define the grounds for invalidation (Article 19).<sup>47</sup>

It is worth saying that, as some researchers put it, the Geneva Act generally failed to meet the expectations of those involved with regard to "bridging" differences between the Old and New World's approaches.<sup>48</sup> The international regime established by the Treaty is still dominated by the European approach, what Micara calls 'crucial achievement and EU victory' in the negotiations.<sup>49</sup> In detail, however, not all guidelines were implemented with equal success. Inserting the geographical indications clause into the Geneva Act made the document attractive 'for a limited though not insignificant number of nations' (guideline "a").<sup>50</sup> The main limitation results from the argument that the geographical indication approach *cannot* be attractive for countries of *common law*. Nevertheless, a number of countries, including those intending to cooperate with the EU and EU member states, can be expected to become parties to the treaty.<sup>51</sup> Therefore, this guideline and guideline "b" were successfully implemented.

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<sup>45</sup> Council, Council decision on WIPO Diplomatic Conference on the protection of audiovisual performances (Beijing, June 20 to 26, 2012), 9300/12 PI 49 CULT 74, Negotiating Directives 2012, Abs. 2, limited access (declassified upon the author's request).

<sup>46</sup> J. Reinbothe & S. von Lewinski, *The WIPO Treaties on Copyright*, Oxford: Oxford University Press 2015, p. 15.

<sup>47</sup> Council, Council decision authorising the opening of negotiations on a Revised Lisbon Agreement on Appellations of Origin and Geographical Indications, ST 7678/15 + ADD1 PI 21 COMER 49 AGRI 170, Negotiating Directives, restricted.

<sup>48</sup> D. Gervais, 'A Look at the Geneva Act of the Lisbon Agreement. A Missed Opportunity?' in I. Calboli & N. Wee Loon (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific*, Cambridge: Cambridge University Press 2017, p. 24.

<sup>49</sup> Micara 2016, *supra* note 34, p. 679.

<sup>50</sup> D. Gervais & M. Slider, 'The Geneva Act of the Lisbon Agreement. Controversial Negotiation, Controversial Results,' in van Caenegem, W. & Cleary, J (eds), *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development*, Basel: Springer International Publishing 2017, p. 18.

<sup>51</sup> *Idem*, p. 14.

Furthermore, the EU was able to extend Article 5 of the Geneva Act to include the option of common registration in the event of a cross-border production cycle. What is new is the option of submitting for registration only once, if contiguous contracting parties involved agree, and an option of granting a transition period for discontinuing application of the expiring geographical indication system in Article 17 (guideline “c”). Only the implementation of amendments to Articles 13 and 19 was successful: the prevalence of prior trademarks known as the ‘first in time, first in rights’ principle was relativised, but not completely rejected as intended by the Council.<sup>52</sup> Equally, although the Geneva Act was supplemented by a paragraph recognising the power of any individual or legal person to institute proceedings, a clearly defined catalogue of grounds for invalidation of a trademark’s registration (the EU’s goal) remained unaddressed.

In spite of these omissions, negligible as they are, the treaty has been dominated by the EU-preferred approach and can therefore be designated – as mentioned above – an EU victory. Consequently, indicator 3 according to the EU actorness model of Gehring et al. (2013) points to recognition of the EU by WIPO in the case of the Geneva Treaty. Since recognition was ascertained in all three cases, full *recognition* of the EU by WIPO and hence actorness can be regarded as given. Finally, since the EU is not a member of WIPO (variable *non-membership* according to Gehring et al.), the expectation set out in the reference model – only *action capability* and not *formal membership* is causal for *recognition* – has also been met.

## IV.2 UNESCO

Similarly to WIPO, UNESCO, founded in 1945, is a special UN organisation whose primary aim is to contribute to maintaining peace and security by promoting international cooperation in the fields of education, science and culture.<sup>53</sup> Accordingly, this article deals with relations between UNESCO and the EU in three areas of action: education (the EU’s complementary competences according to Article 6 TFEU), science (shared competences under Article 4 TFEU) and culture (complementary competences, Article 6 TFEU).

Membership in UNESCO is not linked to that in the UN and is granted only to states. An exceptional associate membership pursuant to Article II paragraph 3 of the UNESCO Charter providing for admission of former colonies and territories ‘not responsible for the conduct of their international relations’, does not seem to be a format compatible with the EU either.<sup>54</sup> Hence, the Union is not a member of UNESCO (variable *non-membership* according to the EU actorness model of Gehring et al. [2013]) and is not represented in UNESCO’s governing bodies. The main consequence of which is that the EU cannot participate financially in the UNESCO overall budget. However, cooperation occurs in the form of projects, especially in the field of culture.

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<sup>52</sup> Gervais & Slider 2017, *supra* note 50, p. 13.

<sup>53</sup> German UNESCO Commission at: <https://www.unesco.de/en> (accessed 5 July 2021).

<sup>54</sup> G. Butler, ‘United Nations Educational, Scientific and Cultural Organization (UNESCO). The EU’s transition from observer to full participant on an ad hoc basis,’ in R. Wessel, & J. Odermatt (eds), *Research Handbook on the European Union and International Organization*, Northampton: Edward Elgar Publishing, Inc. 2019, p. 144.

It is worth saying that both organisations show an apparent similarity in their value orientation. Since cultural diversity is among the highest priorities of both organisations,<sup>55</sup> it is not surprising that the EU was involved in negotiations on the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (*actorness* indicator 1 according to the EU actorness model of Gehring et al. [2013]), which is one of the most significant UNESCO legal tools – described by the Austrian UNESCO Commission as cultural policy’s “Magna Carta” – and to which the EU is party (indicator 2).<sup>56</sup> The Convention brought two innovations. First, it recognises cultural goods and services as bearers of identities, values and aesthetic settings, which means that the value for money of cultural goods and services is not exhausted by the financially quantifiable. Second, the right of states to their own cultural policy despite their obligations stemming from other international agreements has been recognised. Following this, states might be able to adopt supportive measures in favour of the local arts, even if from the point of view of the neoliberal economic doctrine such measures distort market competition. Hence, the Convention protects a state’s wide leeway in cultural policy. Furthermore, the Convention obligates its signatories to adopt measures necessary for upholding the diversity of cultural supply in all phases of the value chain, promoting creativity and creative processes, enabling access to diverse cultural goods and finally, for protecting human rights and freedom, while involving civil society. In particular, Article 1 of the Convention is intended to promote dialogue, exchange and mutual respect between cultures.<sup>57</sup> Culture is traditionally understood by UNESCO as ‘the set of distinctive spiritual, material, intellectual and emotional features of society or a social group [...] that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs’.<sup>58</sup> As mentioned above, the EU has complementary competences in the field of cultural policy. As a result, the European Union was represented during the negotiations on the Convention by the Council Presidency in coordination with the Commission. In spite of this duality, the Union succeeded in speaking in two-voice unison, which ‘is not exceptional, but can surely be seen as ‘unusual’ in the cultural field and a true novelty in the UNESCO seat’.<sup>59</sup> The EU was invited to participate in negotiations with a *special observer* status on an explicitly ‘exceptional basis ... as fully as appropriate’.<sup>60</sup> This went ahead despite resistance from some UNESCO members such as the USA and Russia which was finally surmounted by the UNESCO Executive Council.

The guidelines of the negotiation directives adopted by the Council prior to negotiations set out to ensure that the Convention’s norms coincide with the *aquis communautaire* and that ‘the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of

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<sup>55</sup> German UNESCO Commission, 'UNESCO – Organisation der Vereinten Nationen für Bildung, Wissenschaft und Kultur', at: <https://www.internationales-buero.de/de/unesco.php>, 2020, (accessed on 25 December 2020). See also TEU Preamble.

<sup>56</sup> Austrian UNESCO Commission, 'Die UNESCO-Konvention', at: <https://www.unesco.at/kultur/vielfalt-kultureller-ausdrucksformen/die-unesco-konvention> (accessed on 25 December 2020).

<sup>57</sup> 2005 UNESCO Convention on The Protection and Promotion of The Diversity of Cultural Expressions, Article 1.

<sup>58</sup> 2001 UNESCO Universal Declaration on Cultural Diversity, Preamble.

<sup>59</sup> D. Ferri, 'EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Some Constitutional Remarks', *European Diversity and Autonomy Papers* 2005-3, p. 8.

<sup>60</sup> J. Wouters & A. Andrienne-Moylan, 'The Changing International Cooperation Network of the EU. The Inclusion of the Informal (Regulatory) Bodies', in: R. Wessel & J. Odermatt (eds) *Research Handbook on the European Union and International Organisations*, Northampton: Edward Elgar, Inc. 2019, p. 45.

preserving their cultural diversity'.<sup>61</sup> In addition, the necessity of avoiding incorporating a so-called disconnection clause in the Convention to protect the primacy of Union law against the norms of the Convention was explicitly highlighted.

The most relevant EU documents in the domains covered by the Convention before its adoption, i.e. before 2005, were the CULTURE 2000 programme and the Television without Frontiers Directive (TVWF Directive) of 1989 as well as general norms enshrined in the EU Treaties encompassing cultural, media and human rights policies. The CULTURE 2000 programme was a financial framework for EU measures in the field of cultural policy from 2000 to 2006 with the primary goal of creating a common cultural area by promoting intercultural dialogue within the EU and with foreign societies.<sup>62</sup> The programme maintained the approach set out in Article 151 ECT (now Article 167 TFEU). Moreover, Article 1 paragraph C of the programme sets out the aim of protecting and enriching cultural diversity and forms of cultural expression.<sup>63</sup> Implementation of this goal promoted a number of projects including the European Capital of Culture campaign to sharpen understanding of cultural diversity and intercultural dialogue among the general public.<sup>64</sup> Finally, the programme recognised the intrinsic value of culture and its immaterial function within European society and EU foreign activities.<sup>65</sup>

The TVWF Directive was designed to establish conditions for a free exchange of television programmes and content within the Union. It is worth noting that two clauses (Articles 4 and 5) of this Directive dealt with cultural matters, stipulating preservation 'as far as implementable' of European content, i.e. television channels originating from Europe, and up to 10% of daily broadcasting time from independent producers as a way of protecting European cultural identity from the influence of the USA.<sup>66</sup> The same approach is established in the UNESCO Convention. It recognises the dual nature of audio-visual production as economic performance and a bearer of life designs, traditions and identities. Therefore, it legitimises state intervention in the freedom of media and information insofar as it protects cultural diversity and cultural expression, for instance in the form of quotas for local artists and those involved in cultural industries.<sup>67</sup>

Furthermore, Article 2 UNESCO Convention conceptualises the protection of human rights as an essential component of the protection of cultural diversity: 'Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of

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<sup>61</sup> Council, Council Decision authorising the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the convention on the protection of the diversity of cultural contents and artistic expressions, 13840/04, 2004, Article 1.

<sup>62</sup> Council, 'Programme CULTURE 2000,' at: <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=LEGISSUM%3A129006> (accessed on 25 December 2020), introduction.

<sup>63</sup> European Parliament, Decision Nr. 508/2000/EG of the European Parliament on February 14, CULTURE 2000, Brussels 2000, Article 1(c).

<sup>64</sup> European Parliament, Decision Nr. 508/2000/EG of the European Parliament on February 14, CULTURE 2000, Brussels 2000, Article I.3.

<sup>65</sup> *Idem*, Preamble.

<sup>66</sup> M. Burri, *Implementing the UNESCO Convention in EU's Internal Policies*, Brussels: European Parliament 2010, p. 20.

<sup>67</sup> German UNESCO Commission, 'Die UNESCO-Konvention über den Schutz und die Förderung der Vielfalt kultureller Ausdrucksformen', at: <https://www.unesco.de/kultur-und-natur/kulturelle-vielfalt/kulturelle-vielfalt-weltweit/u40-netzwerk-kulturelle-vielfalt> (accessed on 01 June 2020).

expression, information and communication ... are guaranteed'.<sup>68</sup> However, a few years before the Convention had been adopted, the EU Charter on Fundamental Rights 2000 guaranteed EU citizens freedom of expression and information and the right of older people to participate in social and cultural life.<sup>69</sup> Moreover, Article 22 of the Charter obligates the Union to respect the diversity of cultures, religions and languages.

All three examples show that the European Union had developed a relatively comprehensive polity in areas covered by the Convention long before the launch of negotiations on the UNESCO Convention 2005. This background raised the EU to the status of an indispensable negotiating partner and contributor during the working process. The analysis shows that even though the last Council guideline concerning the disconnection clause was ultimately rejected by the majority of UNESCO members, most EU preferences were incorporated in the Convention. Hence, indicator 3 of the EU actorness model of Gehring et al. (2013) also points to recognition of the EU by UNESCO as an actor. What is more, since, as ascertained above, all three indicators do the same, full recognition of the EU by UNESCO is to be acknowledged. However, given that the EU has only complementary competences in the areas covered by the Convention, this finding cannot be fully explained by the hypothesis of Gehring et al. if one assumes that *action capability* based on the kind of competences the EU has in a particular policy field is causal for *recognition* and therefore *actorness*. Nevertheless, as shown below, this contradiction disappears if the variable *governance resources* is regarded as encompassing an additional ideational component, which requires a slight reinterpretation of the reference model. Two additional explanations will be discussed in the next section.

## V. Additional Explanations

As shown in Section II the key constitutive element of the causal variable *action capability* according to the EU actorness model of Gehring et al. (2013) is *governance resources*, conceptualised primarily as a scope of competences the EU has in a particular policy area. However, my investigation with its focus on UNESCO has revealed that there are some examples of the EU having been recognised by the partner organisation without having had exclusive power in areas of concern, i.e. 'legislative powers on relevant issues that EU member states have transferred to the EU and that are not controlled by them anymore'.<sup>70</sup> By so doing, Gehring et al. put a regulative component based on legislative power in the middle of their model. Correspondingly, the other actorness concepts discussed at the beginning interpret the EU's structural features through the scope of the EU's legislative power. For instance, Urbanski states that 'the more stages of the policy circle that are based on resources from a common pool, the more actorness an international organisation acquires in a specific policy area'.<sup>71</sup>

It is obvious that legislative power is only one of several reasonable components of governance resources. Gehring et al. propose – even without an appropriate examination – a **financial component** as a possible alternative to legislative power. What remains unaddressed is the **ideational component** which seems to be especially relevant in such matters as culture and education. I propose supplementing the EU actorness debate with the ideational component

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<sup>68</sup> 2005 UNESCO Convention on The Protection and Promotion of The Diversity of Cultural Expressions, Article 2.

<sup>69</sup> 2012 Charter of Fundamental Rights of the European Union, Articles 11 and 25.

<sup>70</sup> Gehring, Epiney, Haag & Kotzur 2013, *supra* note 2, p. 854.

<sup>71</sup> Urbanski 2018, *supra* note 4, p. 25.

and explain how to conceptualise it in the following section by discussing three concepts: *normative power*, *soft power* and *diffusion theory*.

## V.1 Normative Power

The concept of normative power was coined by Ian Manners who defined it as an ‘ability to shape conceptions of normal’, i.e. a sort of authority to set out shared normative standards.<sup>72</sup> Normality can be understood as an ‘intersubjective recognition of certain norms and ideas as unquestioned, taken-for-granted facts’.<sup>73</sup> Those subjects which possess normative power perform an example-setting function with regard to what behaviour is to be seen as appropriate, while forming expectations of the others.<sup>74</sup>

Manners sees the key source of the EU’s normative power in the attractiveness of its hybrid political system, i.e. partly intergovernmental and partly supranational.<sup>75</sup> This hybrid nature challenges the traditional Westphalia model of nation-state sovereignty since the EU and its member states have a catalogue of shared fundamental principles. For Manners, the most significant of these principles are democracy, rule of law, social justice, and respect for human rights. These principles, which are attractive for third countries, serve as guides both for EU domestic and foreign activities and can therefore be effectively instrumentalised by the EU.

The concept of normative power has its limitations and has often been criticised. The range of attractiveness that these principles really have is debatable. Whereas Forsberg argues that they find support only from actors which already share them,<sup>76</sup> Larsen acknowledges that the EU is able to assert its principles in international relations only if they are already part of the dominating international discourse.<sup>77</sup> In many regions of the world, the EU is regarded as a negative normative power, rejected as “interfering in internal affairs”.<sup>78</sup> Finally, it is often highlighted that the EU’s self-representation as a norm-led community contradicts its interests-led actions in the spirit of *realpolitik*.<sup>79</sup>

Against the background of these deficits, the solution could be to redefine the concept of “normative” by adding more neutral aspects of the EU’s conduct such as technical expertise and specific knowledge, which Ojanen calls the ‘EU’s competitive advantage’, in lieu of ideological values.<sup>80</sup> Therefore, a particular innovative policy established and implemented by the EU might be an attractive model for a wide range of countries irrespective of whether they

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<sup>72</sup> I. Manners, ‘Normative Power Europe: A Contradiction in Terms?’, *Journal of Common Market Studies* 2002-40(2), p. 236.

<sup>73</sup> T. Lenz, ‘EU normative power and regionalism: Ideational diffusion and its limits’, *Cooperation and Conflict* 2013-48(2), p. 213.

<sup>74</sup> F. Bicchieri, ‘Our size fits all: normative power Europe and the Mediterranean’, *Journal of European Public Policy* 2006-13(2), p. 287.

<sup>75</sup> Manners 2002, *supra* note 72, p. 240f.

<sup>76</sup> T. Forsberg, ‘Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type’, *Journal of Common Market Studies* 2011-49(6), p. 1198.

<sup>77</sup> H. Larsen, ‘The EU as a Normative Power and the Research on External Perception: The Missing Link’, *Journal of Common Market* 2014-52(4), p. 899.

<sup>78</sup> H. Ojanen, *The EU’s Power in Inter-Organisational Relations*, London: Palgrave Macmillan 2018, p. 56.

<sup>79</sup> L. Aggestam, ‘Global norms and European power’, in K. E. Jørgensen & K. V. Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions, Performance, Policy, Power*, Abington: Routledge 2013, p. 458.

<sup>80</sup> Ojanen 2018, *supra* note 78, p. 95.

share the EU values or not. As soon as an EU policy is regarded as attractive, the EU would be recognised by the partner organisation as an actor in line with the EU actorness model of Gehring et al. (2013).

## V.2 Soft Power

A concept that arose out of the geopolitical realities of the USA, soft power relates to a specific form of ideational power which is given ‘when one country gets other countries to want what it wants’ without ‘hard or command power of ordering others to do what it wants’.<sup>81</sup> The tool for influencing others is attractiveness:

‘A country may obtain the outcomes it wants in world politics because other countries – admiring its values, emulating its example, aspiring to its level of prosperity and openness – want to follow it. In this sense, it is also important to set the agenda and attract others in world politics, and not only to force them to change by threatening military force or economic sanctions. This soft power ... co-opts people rather than coerces them.’<sup>82</sup>

For Nye, the main resources of soft power are ideology, culture and institutions.<sup>83</sup> Since the EU does not possess a clearly definable cultural identity as states do, the cultural essence of its soft power differs from that of nation-states. The basis of the EU’s cultural attractiveness is its cultural diversity and commitment to protecting democracy and human rights:

‘The EU’s historical narrative of peaceful integration between previously warring states is a significant source of soft power – and one for which it received the Nobel Peace Prize in 2012. The reordering of relations between nations based on the rule of law, and the elaborate balancing of interests between larger and smaller members, makes the EU attractive in the eyes of outsiders. ... Another potential source of soft power is the EU’s stated commitment to certain normative principles, particularly democracy and human rights, including a strong emphasis on women’s rights, which shows in the incorporation of several international human rights conventions into the *acquis*, and in the monitoring of potential members’ performance under the Copenhagen Criteria.’<sup>84</sup>

Although the two concepts have similarities, one difference is remarkable: in comparison to normative power, soft power stems not from what the EU is, i.e. from the EU’s particular structural factors, but rather from what it does. Considered in this way, soft power is a result of goal-oriented activities of the Union and can be linked to the behaviouristic actorness factors discussed at the beginning. Hence, in order to decide between normative and soft power in an empirical analysis, the reference point should be whether the EU had developed any strategies prior to negotiations aimed at enhancing the attractiveness of its policies, values and preferences to the partner organisation.

In addition, diffusion theory can be a plausible explanation of why states find some EU norms and policies attractive and how norms and policies are transferred. The theory explains two mechanisms. The first one is *socialisation*, a process of discursive discussion in which the EU

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<sup>81</sup> J. Nye, ‘Soft Power’, *Foreign Policy* 1990-80, p. 3.

<sup>82</sup> J. Nye, ‘Public Diplomacy and Soft Power’, *The ANNALS of the American Academy of Political and Social Science* 2008-616(1), p. 94.

<sup>83</sup> Nye 1990, *supra* note 81, p. 166.

<sup>84</sup> K. Nielsen, ‘EU Soft power and the Capability-Expectations Gap’, *Journal of Contemporary European Research* 2013-9(5), p. 729.

appeals to ‘another actor’s causal or normative understanding of the world to spread its norms and practices entailing both positive strategies of persuasion and teaching as well as negative ones such as naming and shaming’.<sup>85</sup> Since it requires an active intervention on the part of the EU, I link *socialisation* with soft power and with behaviouristic actorness factors. The second mechanism, *emulation*, denotes ‘a process by which an actor learns from or copies a successful example’s or cultural peer’s norms and practices’.<sup>86</sup> Unlike socialisation, this process occurs without an active intervention from the EU and therefore corresponds with the concept of normative power.

Table 4 is designed to visualise the additional explanations recently discussed within the academic debate on EU actorness.

<b>Factors</b>	<b>Characteristic features</b>	<b>Scientists</b>
Structural factors	<ul style="list-style-type: none"> <li>- internal features (norms, preferences, policy and procedural cohesion, normative and soft power resources)</li> <li>- structural capacities to act (<i>capability</i> and <i>action capability</i>)</li> <li>- <i>consistency</i></li> </ul>	Bretherton & Vogler 2006; Conceição-Heldt & Meunier 2014; Gehring, Oberthür & Mühleck 2013; Hill 1996; Jupille & Caporaso 1998 Koops 2011; Pavlovsky 2021; Sjöstedt 1977, 1998; Thomas 2006; Urbanski 2018
Behaviouristic factors	<ul style="list-style-type: none"> <li>- particular practical realisation of the structural capacity to act</li> <li>- strategies to enhance attractiveness (soft power)</li> </ul>	Bretherton & Vogler 2006; Pavlovsky 2021; Rhinard & Sjöstedt 2019
External factors	<ul style="list-style-type: none"> <li>- international recognition and authority immanent to the EU (<i>recognition</i>)</li> <li>- international environment and discourse</li> <li>- internals of partner organisations</li> <li>- emulation and diffusion</li> </ul>	Bretherton & Vogler 2006; Delreux 2014; Gehring, Oberthür & Mühleck 2013; Jupille & Caporaso 1998

**Table 4** *EU actorness factors including additional explanations*

## VI. Conclusion

In the present paper, I have tested the explanatory power of the EU actorness model of Gehring et al. (2013) by examining two cases representing the relations of the EU with two international organisations, WIPO and UNESCO. The analysis shows that the reference model – based on structural and external, but not on behaviouristic factors according to my own categorisation

<sup>85</sup> Lenz 2013, supra note 75, p. 213.

<sup>86</sup> T. Diez & J. Manners, ‘Reflecting on Normative Power Europe’, in F. Berenskoetter & M. Williams (eds), *Power in World Politics*, London: Routledge 2007, p. 183.

proposed in section I – possesses only partial explanatory power since there are examples (cf. UNESCO) of *recognition* of the EU by the partner organisation as an actor (and therefore its actorness) despite the EU's *low action capability* in the field of cooperation according to the terminology of the reference model (expectation of the reference model: *non-actorness*).

I proposed a reinterpretation of the EU actorness model by Gehring et al., supplementing it with an additional ideational component of the variable *governance resources*. For that, I applied concepts of *normative* and *soft power* supplemented by diffusion theory. Due to the limited scope of the present research, it was not possible to test the additional approaches empirically, for instance by examining cases other than UNESCO. It seems to be promising to focus future research on the EU's cooperation with such regional organisations as ASEAN, AU or MERCOSUR, for they provide the best examples for testing diffusion theory. Generally, more detailed findings concerning EU actorness in relations with international organisations would provide more insights into the nature of the EU according to the famous ancient wisdom *dic mihi, quis amicus tuus sit, et tibi dicam, quis sis*.<sup>87</sup>

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<sup>87</sup> In English: 'tell me who your friends are and I will tell you who you are'.