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Explicit legislative characterisation of overriding mandatory provisions in EU Directives: Seeking for but struggling to achieve legal certainty

Johannes Ungerer*

Traditionally, the judiciary has been tasked with characterising a provision in EU secondary law as an overriding mandatory provision ("OMP") in the sense of Art 9(1) Rome I Regulation. This paradigm has however shifted recently as the legislator has started setting out such OMP characterisation explicitly, which this paper addresses with regard to EU Directives. The analysis of two Directives on unfair trading practices in the food supply chain and on the resolution of financial institutions reveals that their explicit legislative characterisations of OMPs can benefit legal certainty if properly drafted by the EU and correctly transposed into national law by the Member States. These requirements have not yet been fully met as there are inconsistencies and confusion with only domestically mandatory provisions, which need to be resolved. More generally, the paper elucidates the tensions of competence between legislators and courts on both the EU and national levels due to the explicit legislative characterisation. It also considers the side effects on pre-existing and future provisions in Directives without explicit legislative characterisation. Finally, it acknowledges that the extraterritorial effect of OMPs is intensified and therefore requires the legislator to seek international alignment.

Keywords: Overriding Mandatory Provision; EU Directive; Rome I Regulation; Unfair Trading Practices; Resolution of Financial Institutions; Characterisation; Competence; Extraterritoriality

A. Introduction

The characterisation of a provision of EU secondary law as an overriding mandatory provision ("OMP") in the sense of Art 9(1) Rome I Regulation has traditionally been regarded as the sole domain of the judiciary. However, the legislator can also decide to set out OMPs explicitly, which is particularly interesting when adopted in an EU Directive that also requires transposition of this characterisation into national law. So far, explicit legislative characterisation of OMPs in

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Directives has been employed in two instances in quite different areas of law. Lacking due attention in scholarship to date, it is a novel phenomenon with great potential because it can establish the characterisation with legal certainty. This is the focus and perspective of this paper as a contribution to the much wider discussion of OMPs and their characteristics and effects. For a better understanding of the special technique to be discussed here, it is necessary to examine to what extent explicit legislative characterisation of OMPs in Directives relies for effectiveness on good drafting by the EU legislator and correct transposition into national law by the legislators of the Member States. Legislatively unresolved issues of characterisation inevitably leave issues to be resolved by the judiciary. Moreover, a better understanding of the technique requires reflection on some aspects of its diverse consequences for legislators and courts at the EU and national levels, for Directives without the explicit legislative characterisation, and also for other jurisdictions.

This article aims to take a first step towards such a better understanding of explicit legislative characterisation of OMPs, specifically in EU Directives and their national transposition. Part B outlines the background of how OMPs have traditionally been identified by the judiciary and reveals some of the problems with EU Directives. Part C elucidates the two existing instances of explicit legislative characterisation of OMPs in Directives and their transpositions. First, it discusses unfair terms regulation in the food supply chain and identifies problems the EU legislator has been facing when characterising OMPs in the Unfair Trading Practices Directive (UTPD).[1] Secondly, the resolution of financial institutions will be addressed and issues of transposing the explicit legislative characterisation of OMPs of the Bank Recovery and Resolution Directive (BRRD)[2] into national law will be examined. Part D will deal with selected major consequences of explicit legislative characterisation: horizontal tensions of legislative and judicial competence as well as vertical tension of EU and national competence; side effects of the novel technique on pre-existing and future Directives which lack explicit legislative characterisation; and intensified extraterritorial effects of OMPs which are explicitly characterised by the EU legislator. The aim of the paper is to show that explicit legislative characterisation of OMPs in Directives is useful as it can immensely benefit legal certainty and harmonisation, but it needs to be drafted and implemented properly in full awareness of the consequences. This will also be instructive for employing explicit legislative characterisation of OMPs in future Directives, for instance in a Directive on corporate due diligence and

[1]Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, [2019] OJ L111/59.

[2]Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, [2014] OJ L173/190.

corporate accountability as requested by the European Parliament in a recent resolution.[3]

B. The background: traditional characterisation of OMPs by the judiciary and its problems with Directives

Traditionally, the decision whether a certain EU legal provision fulfils the definition of an OMP has solely depended in the first instance on the interpretation by the Member State courts, and ultimately by the Court of Justice of the European Union (CJEU).[4] This role of the judiciary was confirmed in the *Unamar* case,[5] and need not be explored further for present purposes. What matters is that the EU legislator has – until recently – not intervened with the judicial characterisation of any provisions as 'overriding mandatory' by prescribing such characterisation itself. EU legislative action has been limited to setting out the substantive criteria for the judicial characterisation in an autonomous definition in Art 9 Rome I Regulation,[6] which entered into force in 2009 and overcame its predecessor's ambiguous wording of mandatory rules in Art 7 Rome Convention.[7] In short, OMPs must be more than domestically mandatory provisions that cannot be derogated from by contractual agreement of the parties.[8] Specifically, OMPs are different from domestically mandatory provisions

[3]European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), P9_TA-PROV(2021)0073.

[4]Andrea Bonomi, "Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts" (2008) 10 *Yearbook of Private International Law* 285, 289–290; Andrea Bonomi, "Article 9", in: Ulrich Magnus and Peter Mankowski, *European Commentaries on Private International Law* (Otto Schmidt vol 2, 2017), paras 48–49; Franco Ferrari, *Concise Commentary on the Rome I Regulation* (CUP 2nd edn 2020), Art 9 para 7; Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP 2015), paras 15.46–15.48; Paul Torremans et al, *Cheshire, North & Fawcett, Private International Law* (OUP 15th edn 2017), 746.

[5]Case C-184/12 *Unamar,* para 50.

[6]Bonomi (n 4) 289; McParland (n 4) paras 15.12 and 15.45; Dennis Solomon, 'The Private International Law of Contracts in Europe: Advances and Retreats' (2008) 82 *Tulane Law Review* 1709, 1735–1739; contested by Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (5th edn 2019), para 12-017. The definition is, according to the draft documents (COM(2005) 650 final, p 7), based on the *Arblade* judgment by the CJEU (Case C-369/96, para 30), which did not concern private international law, but Belgian public policy legislation in light of fundamental freedoms; it resembles earlier descriptions by Phocion Francescakis, 'Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles des conflits de lois' [1966] *Revue critique de droit international privé* 1.

[7]McParland (n 4) para 15.18 with reference to EU Commission, Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, sec 3.2.8.1.

[8]Bonomi (n 4) para 6; Plender and Wilderspin (n 6) para 12-002; Torremans (n 4) 745-746.

because OMPs are crucial for safeguarding public interests in cases where otherwise a foreign law would be applicable, that means to have 'overriding reach'.[9] The same definition can be deemed to apply in the context of the Rome II Regulation, which refers to OMPs in its Art 16.[10]

With regard to Directives, there has been a great deal of uncertainty around the judicial characterisation of provisions as, using the modern terminology, OMPs. Under the Rome Convention, characterising provisions in Directives and their national transpositions was all but uniform. The controversy in the courts mainly concerned Directives on consumer protection.[11] For instance in German courts,[12] some transposed provisions of these Directives were not recognised as OMPs because they did not primarily seek to protect public interests on the international plane,[13] such as market regulation and social policies, but focused on the unilateral protection of the presumably weaker party of the private contract.[14] The opposite view was taken by courts of other Member States, such as in France[15] and Italy,[16] in line with an example in the Giuliano and Lagarde report on the Rome Convention, which named consumer protection provisions as OMPs.[17]

[9]Bonomi (n 4) para 86.
[10]Patrick Wautelet, 'Artice 16', in Magnus and Mankowski (n 4), para 13.
[11]Art 6(2) Directive 93/13/EEC on unfair terms in consumer contracts; Art 7(2) Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art 12(2) Directive 2002/65/EC concerning the distance marketing of consumer financial services; Art 12(2) Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.
[12]German Federal Court of Justice (Bundesgerichtshof), Case XI ZR 82/05, BGHZ 165, 248, 255–259 on consumer credit law. On unfair contract terms law: Case X ZR 19/08, BGHZ 182, 24, para 32.
[13]Jan-Jaap Kuipers, *EU Law and Private International Law* (Nijhoff 2012), 144-146.
[14]Michael Wilderspin, 'Overriding Mandatory Provisions', in Jürgen Basedow et al (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017), 1332. Still maintained by Ferrari (n 4) Art 9 para 11. By contrast, the reflex is considered as sufficient by Martin Schmidt-Kessel, "Article 9", in Franco Ferrari (ed), *Rome I Regulation* (CUP 2015), para 11.
[15]Cass. civ. 1re, 23 May 2006, Case 03-15.637, Bulletin 258. Cf on the German-French controversy Jan-Jaap Kuipers and Sara Migliorini, 'Qu'est-ce que sont les "lois de police"? Une querelle franco-allemande après la communautarisation de la Convention de Rome' (2011) 19 *European Review of Private Law* 187.
[16]Andrea Bonomi, Le norme imperative nel diritto internazionale privato (Schulthess 1998), 190; Fausto Pocar, La legge applicabile ai contratti con i consumatori, in: Tullio Treves (ed), *Verso una disciplina comunitaria della legge applicabile ai contratti* (Cedam 1983), 315.
[17]Mario Giuliano and Paul Lagarde, 'Report on the Convention on the law applicable to contractual obligations', [1980] OJ C282/1, 28. Also compare CJEU, Case C-168/05 *Mostaza Claro*, paras 35-38, in which the CJEU regarded the consumer protection rules of the Unfair Terms Directive 93/13/EEC as belonging to EU public policy in the context of arbitration.

Although it introduced the autonomous uniform definition of OMPs, the Rome I Regulation has not been able to resolve these disagreements about judicial characterisation of provisions in Directives, but continues to rely on what can only amount to a workaround in order to mitigate the controversy. Both under the Rome Convention and the Rome I Regulation, it ultimately does not matter whether provisions protecting individuals are excluded from the OMP definition or whether they are included. The reason is that, even if not qualified as being overriding mandatory provisions, consumer protection provisions in Directives can come under Art 23 Rome I Regulation, previously Art 20 Rome Convention, which gives precedence to Union law that lays down particular conflict of laws rules. Member States such as Germany have used this workaround to reach their goal of strong consumer protection in cases involving non-EU jurisdictions.[18]

However, the workaround does not fit at all for provisions in Directives which do not contain special conflict of laws rules. Also, whether a provision contains a conflict of laws rule and, if so, whether it is a more special rule than the general rules in the Rome I Regulation depends once more on the courts; uniform interpretation can only be achieved by the CJEU. Furthermore, even where the workaround applies, it completely sidelines and neglects the definition of OMPs introduced by the legislator in the Rome I Regulation. The workaround does not employ the legislatively defined concept, which intends to contribute to establishing legal certainty. Essentially, the workaround suppresses addressing the actual problem of OMP characterisation.

C. The novelty: explicit legislative characterisation of OMPs in Directives

Against this background, it amounts to a paradigm shift that the EU legislator has recently avowed itself to resolving the problem of uncertainty by enacting Directives which explicitly characterise some of their provisions as OMPs. Indeed, determining the characterisation by statute seems very advantageous, because it has the tremendous benefit of creating legal certainty and it also relieves the courts, yet it relies on adroit drafting in the text of the Directive as well as on accurate transposition into national law. It will be questioned, however, whether the EU and national legislators – independent from the judiciary – have succeeded with providing for explicit characterisation of OMPs.

1. *OMPs to protect against unfair terms in the food supply chain: Art 3(4) UTPD*

Seeking for and struggling with legal certainty is evident from the most recent Directive which contains an explicit legislative characterisation of OMPs: the

[18]Art 46b(3) EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuche = Introductory Act to the Civil Code).

2019 Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, which was referred to above as the Unfair Trading Practices Directive or, in short, UTPD. Acknowledging initially some of the difficult regulatory context of the UTPD will prove a useful basis for the subsequent discussion focusing on the explicit legislative characterisation of its OMPs. It will be demonstrated that there are some flaws in how the EU legislator drafted and adopted the characterisation, which is unfortunate because consequently the UTPD struggles to achieve a legally certain protection against unfair terms in the food supply chain.

The provisions of the UTPD are set somewhere between contract and competition law, trying to respond to issues of agricultural trading and pricing and aiming to establish minimum protection for weaker business parties, such as farmers. Unfair trading practices between businesses in the food supply chain can be grave but they have neither been covered by the personal scope of the Unfair Commercial Practices Directive 2005/29/EC,[19] which applies in business-to-consumer cases, nor by the substantive scope of either Directive 2006/114/EC[20] protecting traders against misleading advertising or Directive 2011/7/EU[21] combating late payment in commercial transactions. As the EU Treaty provisions on competition law[22] usually cannot be applied to the agricultural sector, due to an exception,[23] there has been a need to establish a minimum level of protection against business-to-business unfair trading practices through secondary law, such as a Directive.[24]

For years the EU Commission has sought to improve the protection of small food producers and retailers against unfair trading practices of their often stronger

[19]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), [2005] OJ L149/22.

[20]Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, [2006] OJ L376/21 (codified version).

[21]Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, [2011] OJ L48/1.

[22]Art 101ff TFEU.

[23]Art 42(1) TFEU.

[24]Secondary law is permitted by Art 42(1) and 43(2) TFEU. Cf Stephen Hurley et al, "Sectoral Regimes", in David Bailey and Laura Elizabeth John (eds), Bellamy & Child, *European Union Law of Competition* (OUP 8th edn 2018) paras 12.171–12.174; also Jörg Gundel, "Agrarpolitik versus EU-Wettbewerbsrecht: Welche Spielräume hat der Unionsgesetzgeber?" [2019] *Neue Zeitschrift für Kartellrecht* 302, 303. Further: Victoria Daskalova, "The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?" (2019) 10 *Journal of European Competition Law & Practice* 281.

trading partners through secondary law.[25] However, the legislative initiative stalled and instead voluntary schemes were considered to reduce unfair trading practices in the food supply chain,[26] yet Parliament and Council called for another U-turn, demanding legislative action.[27] This back-and-forth led to the adoption of the UTPD, which seeks to combat uncertainty and undue transfer of risk,[28] but it has been met with a variety of opinions.[29]

The adopted UTPD only intends to harmonise minimum requirements across the Member States;[30] however, it allows Member States to go beyond these minimum requirements, and the existing law of some Member States is much stricter already. The UTPD can be transposed as necessary by amending, for instance, national antitrust provisions or rather provisions for the review of standard terms and conditions; choosing the appropriate national area of law for the transposition depends on whether unfair trading prohibitions are construed as competition or contract regulation. The aims of the UTPD are not dissimilar to consumer protection in business-to-consumer transactions, as unfair trading practices in food supply chains are considered to result from imbalances in bargaining power.[31] Yet, imbalances in food supply chains are inverted (supplier protection

[25]European Commission, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, COM(2013)37 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling unfair trading practices in the business-to-business food supply chain, COM(2014)472 final.

[26]European Commission, Report from the Commission to the European Parliament and the Council on Unfair Business-to-Business Trading Practices in the Food Supply Chain, COM(2016)32 final.

[27]European Parliament, Resolution of 7 June 2016 on unfair trading practices in the food supply chain, P8_TA (2016)0250; Council, Conclusions of 12 December 2016, Strengthening farmers' position in the food supply chain and tackling unfair trading practices, 15508/16.

[28]European Commission, Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018)173 final.

[29]For an extensive collection of debates see Bert Keirsbilck and Evelyne Terryn (eds), *Unfair Trading Practices in the Food Supply Chain* (Intersentia 2020). Further, for instance, Fabrizio Cafaggi and Paola Iamiceli, "Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive" (2019) SSRN paper, https://ssrn.com/abstract=3380355; Anna Piszcz, "EU Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain: Dipping a Toe in the Regulatory Waters?", in Zlatan Meškić et al (eds), *Balkan Yearbook of European and International Law 2019* (Springer 2020); Hanna Schebesta et al, "Unfair Trading Practices in the Food Supply Chain: Regulating Right?" (2018) 9 *European Journal of Risk Regulation* 690.

[30]Art 1(1) UTPD.

[31]Accordingly, the applicability of the UTPD as set out in its Art 1(2) depends on the supplier/buyer turnover ratio.

instead of buyer protection) and are moreover believed to lead to significant negative social and environmental impacts, which is a concern for all national economies and for the EU Single Market.[32] Regardless of the previous situation of national law and the area of law for transposing the Directive, national laws have to be amended in any case to reflect the explicit legislative characterisation of the OMPs.[33]

The explicit legislative characterisation can be found in the last paragraph of Art 3 UTPD, which is the provision sitting at the heart of the Directive and setting out extensive lists of prohibited unfair trading practices for the food supply chain. Art 3 UTPD contains in paragraph 1 specific 'black-listed' trading practices that are always prohibited, and adds in paragraph 2 further 'grey-listed' trading practices that are prohibited "unless they have been agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer."[34] Despite this distinction, Art 3 stipulates in paragraph 4 that "the prohibitions laid down in paragraphs 1 and 2 constitute overriding mandatory provisions which are applicable to any situation falling within the scope of those prohibitions." The view that paragraph 4 does contain an explicit legislative characterisation of OMPs which claim an internationally overriding reach – in contrast to only domestically mandatory provisions – is affirmed by the addition that the prohibitions in paragraph 1 and 2 shall be applicable "irrespective of the law that would otherwise be applicable to the supply agreement between the parties." The explicit legislative characterisation has been featured in the Directive since the Commission's proposal,[35] and is unanimously accepted by scholars.[36]

Analysing the UTPD's explicit legislative characterisation in greater detail, there are a couple of inconsistencies, which result in a disservice to the intention of this technique to increase legal certainty. To start with, the Directive characterises the 'grey-listed' prohibitions set out in paragraph 2 to have an internationally overriding reach although they are not even domestically mandatory; rather, these

[32]European Parliament, Committee on Agriculture and Rural Development, Report of 10 December 2018 on the proposal for a directive of the European Parliament and the Council on unfair trading practices in business-to-business relationships in the food supply chain, A8-0309/2018.

[33]For instance, in Germany, the UTPD has meanwhile been transposed into the Agrarorganisationen-und-Lieferketten-Gesetz (as amended by the Zweites Gesetz zur Änderung des Agrarmarktstrukturgesetzes of 2 June 2021, BGBl. 2021 I 1278). However, the German Act does not refer explicitly to the OMP characterisation at all (see §§10ff.). Only the drafting documents contain the comment that (in translation) "these provisions are OMPs which apply to all cases falling within the scope of this chapter, irrespective of the applicable law" (German Federal Government, draft legislation of 1 January 2021, BR-Drs. 3/21, 44).

[34]Cf Schebesta (n 29) 693.

[35]EU Commission (n 28).

[36]See, for instance, Cafaggi and Iamiceli (n 29); Piszcz (n 29) section 4; Schebesta (n 29) 694.

'grey-listed' unfair trading practices can be part of a valid agreement as long as the agreement has been made previously in clear and unambiguous terms or if it is a subsequent agreement.[37] This is not only conceptually self-contradictory, it also resembles quite an arrogation: the EU legislator is demanding internationally mandatory applicability of the EU prohibitions, overruling otherwise applicable foreign law, despite permitting domestic derogation within the EU regime. It is hard to believe how a prohibition can intend to be always applicable, regardless of any other applicable law, when it is not even always applicable under its own law.[38] Until this is legislatively remedied, the last resort and only solution seems to be to turn to the judiciary. When courts interpret and apply the 'overriding mandatory' provisions of Art 3(2) UTPD, they can set the threshold for the agreement requirements so high that they effectively make it impossible to validly derogate from the 'grey-listed' prohibitions domestically; only when they are blacked out as much as possible, it could be deemed acceptable to treat the 'grey-listed' prohibitions as internationally mandatory as well. The ongoing reliance on the courts is thankless, and moreover methodologically difficult: The only viable way for the judges might be to employ a method similar to the method of teleological reduction (*telelogische Reduktion*).[39] It could be used to argue that, contrary to the wording of paragraph 2, the possibility to derogate domestically is essentially ignored and not granted, in order to uphold and justify the telos of the entire provisions to establish overriding mandatory prohibitions.

Even more bizarrely than the issue with the grey-listed prohibitions in Art 3(2) UTPD, the term for the explicit legislative characterisation in Art 3(4) UTPD does not refer in all language versions of the UTPD to "overriding mandatory provision" as defined in Art 9 Rome I Regulation. Having conducted an empirical analysis of all of the 24 language versions of the Directive, the result is that only in 14 languages (such as in English or Spanish) the term used in the UTPD coincides exactly with the term used in Art 9 Rome I Regulation. For instance, "leyes de policía" is consistently used in the Spanish versions of Art 3 UTPD and Art 9 Rome I Regulation, which is by no means inevitable because the differing term "normas de aplicación necesaria" was traditionally preferred.[40]

[37]Debating the questionable logic of these requirements in terms of timing and substance would go beyond the scope of this paper.
[38]Torremans (n 4) 745–746.
[39]In EU law, so far, this method has only been considered by Advocate Generals, yet not applied by the Court: AG Alber, Case C-434/98P *Busacca*, para 25; AG Trstenjak, Case C-199/08 *Eschig,* paras 79ff; AG Bobek, Case C–177/15 *Nelsons*, para 37; AG Bobek, Case C–526/19 *Entoma*, para 60. The German Federal Administrative Court, Case 4 CN 5/13, para 14, applies the following (translated) definition: "If a provision, according to its literal sense, covers situations which it was not intended to cover according to the apparent intention of the legislator, courts are authorised to correct the wording of the provision and an excessive provision is to be attributed by way of teleological reduction to the scope of application intended for it according to its sense and purpose."
[40]Bonomi (n 4) para 7.

However, in the other ten languages (such as German or French), a similar but nevertheless significantly different wording is used in the UTPD in comparison to Art 9 Rome I Regulation. For instance, whilst the German version of Art 9 Rome I Regulation defines "Eingriffsnormen", Art 3 UTPD refers in German to "übergeordnete zwingende Bestimmungen"; the same problem occurs in French where "lois de police" is displaced by "dispositions impératives dérogatoires". The French case is particularly bizarre because the French language version of the Commission's proposal had used the correct term "une loi de police", whose singular was a minor problem for referring to both paragraphs 1 and 2; yet, in trying to improve it, matters were only made worse in the eventually adopted French text of the Directive by replacing the correct term completely.

The consequences of these ten instances of incorrect language versions cannot be shrugged off by simply underplaying them as translation omissions in the legislative process, which they most certainly are. Rather, missing the proper use in Art 3 UTPD of the terms as defined in Art 9 Rome I Regulation exacerbates the problematic differentiation of whether Art 3 UTPD indeed sets out OMPs or whether, if at all, the provisions are only domestically mandatory. The explicit legislative characterisation is doing itself a disservice where it does not consistently use the proper terms across all languages.

Lacking this vital consistency, the characterisation depends on the courts (and their linguistic interest and ability) to interpret the legalistically incorrect wording in Art 3 UTPD and replace it, *contra legem* or better '*contra linguam*', with the actual term of overriding mandatory provisions in the proper sense of Art 9 Rome I Regulation. However, this solution is far from certain because Art 3 UTPD does not even include an explicit reference to Art 9 Rome I Regulation. Hence, it is imaginable that courts could conduct a diverging analysis and arrive at a different interpretation than proposed here.

Summing up, the UTPD had a difficult genesis and has unclear standing, which is particularly evident from the problematic explicit legislative characterisation of the OMPs in Art 3 UTPD. Instead of establishing legal certainty, the EU legislator struggles by characterising allegedly derogable provisions as internationally overriding mandatory ones, which the judiciary might only resolve through teleological reduction. Even worse, the legislative technique is inconsistently adopted across the various language versions of the Directive, which questions the characterisation fundamentally and requires remedial interpretation *contra linguam*.

2. *OMPs to protect the resolution of financial institutions: Art 68(6) BRRD*

The second instance of seeking for and struggling with legal certainty is to be found in Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, which is usually abbreviated to BRRD. In Art 68, the BRRD prescribes the exclusion of certain contractual terms in the context of the resolution of a financial institution, and it particularly stipulates with perfect clarity, in its last paragraph 6, that:

> the provisions contained in this Article shall be considered to be overriding mandatory provisions within the meaning of Article 9 of [the Rome I Regulation].

As will become clear from the following analysis, the EU legislator did a much better job drafting and adopting the explicit legislative characterisation of OMPs in Art 68 BRRD than later in Art 3 UTPD. However, the BRRD is instructive because it reveals that flaws can still appear when Member States transpose the Directive into national law, which might undermine the legal certainty of the explicit legislative characterisation as OMPs. Yet, even if there were also no flaws in the transposition, the case of the BRRD demonstrates that there are still limitations on the applicability of the national transposition of the explicit legislative characterisation.

To appreciate the significance of Art 68 BRRD, one has to take a step back and look at how the EU has, in response to the global financial crisis of 2008/2009, regulated the cross-border reorganisation and winding-up of banks and other financial institutions in distress. Rules on 'reorganisational measures' are governed by the Winding-up Directive[41] and extend to resolution measures of the BRRD.[42] The Winding-up Directive empowers the authorities of the Member State in which the failing financial institution is established to decide according to their own national laws on the reorganisation and resolution of the financial institution.[43]

In this context, serious problems for the efficacy of resolution mechanisms can be caused by termination clauses and close-out netting provisions, which are commonly agreed in derivative contracts (see, for instance, section 6 ISDA® Master Agreement 2002[44]) and in other complex debt instruments of financial institutions with their contracting partners. Ordinarily, the purpose of such termination clauses is to protect one of the contracting parties from the negative consequences of insolvency of the other party; therefore, in the event of insolvency of either party, the contract will be terminated prematurely and all claims will be set off, which is called close-out netting.[45] In principle, netting provisions are solely governed by the contract law chosen by the parties.[46]

[41]Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, [2001] OJ L125/15 (amended by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms … , [2014] OJ L173/190) ('Winding-up Directive').
[42]Art 1(4) Winding-up Directive.
[43]Art 3(1), 3(2), 9(1), 10 Winding-up Directive.
[44]International Swaps and Derivatives Association, Inc. (ISDA®), https://www.isda.org/book/2002-isda-master-agreement-english/. For an example, see https://www.sec.gov/Archives/edgar/data/1065696/000119312511118050/dex101.htm.
[45]Francisco Garcimartín and Maria Isabel Saez, "Set-off, netting and close-out netting", in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015), 332; Philipp Paech, 'Close-out Netting, Insolvency Law and Conflict of Laws' (2014) 14 *Journal of Corporate Law Studies* 419, 424ff.
[46]Art 25 Winding-up Directive.

However, if resolution measures were to trigger these termination clauses, and were to result in set-offs, they could frustrate any opportunity for bailing-in of creditors or transferring assets to another institution. The reason is that the accelerated set-off of claims foils the conversion of debt into equity or the transfer of assets. Consequently, the resolution measures could fail.

This danger is averted by Art 68(1) BRRD: resolution measures shall not be deemed to be insolvency or enforcement incidents under termination clauses and the relevant Financial Collateral Directive[47] and Finality Directive.[48] Early termination and netting under the relevant contracts are suspended in order to prevent their interference with resolution measures.[49]

As derivatives and other complex debt instruments are often cross-border contracts, the BRRD has to ensure that averting the danger which arises from close-out netting is not circumvented by choosing a foreign law to govern the contract. Therefore, where the law of the resolution state does not coincide with the chosen law of the contract, the efficacy of Art 68(1) BRRD is secured under the Winding-up Directive, which provides for applicability of the authorities' law and protects the BRRD's suspension regardless of the law of the close-out netting provision. Additionally, and most importantly, Art 68(6) BRRD ensures that the provisions in Art 68(1) on suspension – or, more precisely, their transpositions into national law[50] – shall be regarded as OMPs explicitly in the sense of Art 9 Rome I Regulation, so that 'they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract'.[51]

For an illustration of how Art 68 BRRD and the explicit legislative characterisation of the OMPs work, it is insightful to consider the following scenario:[52] Spanish bank A has entered into a loan agreement with a Dutch bank B, which includes a choice of law clause according to which the contract is subject to a non-EU law, such as New York law. The contract also includes an early termination clause to provide protection against the consequences of insolvency. After a while, bank A becomes financially distressed and a resolution procedure is

[47]Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, [2002] OJ L168/43 (last amended by Directive 2014/59/EU).

[48]Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, [1998] OJ L166/45 (last amended by Directive (EU) 2019/879).

[49]Garcimartín and Saez (n 45) 342. Also, Francisco Garcimartín, "Derivatives in Cross-Border Insolvency Proceedings", in D Faber and N Vermunt (eds), *Bank Failure: Lessons from Lehman Brothers* (OUP 2017), para 14.39.

[50]Matthias Lehmann, "Private international law and finance: nothing special?" [2018] *Nederlands Internationaal Privaatrecht* 3, 14.

[51]Art 9(1) Rome I Regulation. Cf Garcimartín and Saez (n 45) 342; Paech (n 45) 438.

[52]Modelled on a case described by Francisco J Garcimartín Alférez and Sara Sánchez Fernández, "Resolution and contracts", in Matthias Haentjens and Bob Wessels (eds), *Research handbook on cross-border bank resolution* (Edward Elgar 2019), 207.

instigated at the bank's seat in Spain. Whilst New York law has governed the contract until then, Spanish law seeks to determine the effects of the reorganisation and winding-up now. Only due to Art 68 BRRD, the problematic early termination clause in the loan agreement cannot be triggered by the adoption of a resolution measure in Spain, regardless of the chosen New York law because this protection is, beyond any doubt, characterised by the Directive as an OMP.

Characterising the BRRD's provision on suspension of early termination clauses as an OMP not only ensures that the individual resolution measures are effective, but also that, with regard to other interconnected financial institutions and the national economy, the stability of the financial market is protected against an avalanche of insolvencies triggered by sudden set-offs, which could potentially lead to a melt-down of the financial system. Although the explicit legislative characterisation was not included in the original draft of the BRRD,[53] it was later inserted in the European Parliament's position of the first reading[54] and was consistently enacted across all language versions of the Directive. This could not have been achieved any more clearly and consistently on the EU level.

However, turning to the transposition of the BRRD and of the OMP in Art 68 BRRD into Member State law, Germany can again be taken as an illustrative example, which demonstrates why there may still be problems with a perfectly clear EU characterisation. Particularly, it reveals how a slight slip in the wording of the transposition can devastate the benefits of legal certainty, thus burdening the courts with the task to rectify it. Additionally, it reveals the boundaries of applicability of a transposed explicit legislative characterisation.

The German Act on the Recovery and Resolution of Credit Institutions 2014 (Sanierungs- und Abwicklungsgesetz),[55] which is abbreviated to SAG, transposes the BRRD provisions into national law. § 144(1) SAG copies Art 68(1) BRRD with almost identical wording. In § 144(5) SAG, however, the explicit legislative characterisation differs from Art 68(6) BRRD as it omits any reference to Art 9 Rome I Regulation; instead, the German transposition establishes that 'no rights may be derived from agreements contrary to the provisions of [the

[53]EU Commission, Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM(2012)280 final.

[54]Position of the European Parliament adopted at first reading on 15 April 2014 with a view to the adoption of Directive 2014/ … /EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms … , EP-PE_TC1-COD(2012)0150.

[55]Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen = Act on the Recovery and Resolution of Institutions and Financial Groups, BGBl. 2014 I 2091 (last amended by Gesetz vom 9. Dezember 2020, BGBl. 2020 I 2773).

above] paragraphs.'[56] This wording differs from other instances in German statutory law, for instance in the Commercial Code,[57] where the national legislator more appropriately paraphrases the meaning of OMPs.[58] When transposing Art 68 BRRD into § 144 SAG, as is evident from the preparatory documentation, the German legislator did not reflect on the OMP characterisation at all.[59] Although it probably intended to stipulate that the provisions in § 144 SAG are OMPs, the literal meaning rather suggests that § 144 SAG only contains non-derogable provisions which would be domestically mandatory but would not seek to have an internationally overriding reach.[60] Only the teleological and, with reference to the underlying BRRD, systematic interpretation of § 144 SAG can support the characterisation as OMPs. Without the proper wording and reference to Art 9 Rome I Regulation, the national transposition does a disservice to the technique of explicit legislative characterisation of OMPs, albeit presumably an unintentional one. As a consequence of the inadequate national transposition of the explicit legislative characterisation of the Directive, certainty about the characterisation ultimately depends – once again – on the judiciary.[61]

As much as the explicit legislative characterisation in the BRRD is a meaningful component in the EU's response to the global financial crisis by establishing rules on cross-border reorganisation and winding up of financial institutions, which were supposedly intended to avoid any necessity of judicial interpretation, is still dependent to some extent on the judiciary. It is the fundamental problem that the explicit legislative characterisation is only binding on Member State courts because both Art 68 BRRD and the referenced Art 9 Rome I Regulation are only binding on courts within the EU. According to Art 9 Rome I Regulation, although irrespective of the chosen law for the derivative contract, the OMPs which transpose Art 68 BRRD into the forum law are only compulsorily applied in a dispute relating to a derivative contract which is brought before a

[56]German original: "Aus Vereinbarungen, die den Regelungen der Absätze 1 und 3 zuwiderlaufen, können keine Rechte hergeleitet werden."
[57]§§ 449(4), 451h(3), and 466(5) HGB (Handelsgesetzbuch = Commercial Code).
[58]The commonly used phrase translates to: "If the contract is governed by foreign law, the [German statutory provisions] shall nevertheless apply … " ("Unterliegt der Vertrag ausländischem Recht, so sind die [deutschen gesetzlichen Regelungen] gleichwohl anzuwenden … ").
[59]Art 68(6) BRRD is not mentioned at all in the government's reasoning for the draft legislation: Gesetzentwurf der Bundesregierung, BR-Drs 357/14, 242f.
[60]This probably unintended latter view that the provisions in § 144 SAG are solely non-derogable provisions is, for instance, assumed by Robi Chattopadhyay, *Bridge Banks in Deutschland* (Springer 2018), 412.
[61]As far as this can be determined, there has not yet been a case reported in which the issue is addressed and resolved (January 2021, based on research in the German juris database). This is unsurprising because the courts have not had to deal with another major financial crisis since the BRRD entered into force.

Member State court.[62] Conversely, a court of a third State, such as in the US, is not bound in the same way at all by EU law which claims to have international overriding reach because US law does not provide for any transposition of Art 68 BRRD or an obligation under Art 9 Rome I Regulation. Therefore, the dependency on a Member State court limits the protection granted by Art 68 BRRD like any other OMP, whose internationally overriding mandatory applicability depends on the applicability of Art 9 Rome I Regulation as the court's conflict of laws regime in the first place.[63]

In sum, the explicit legislative characterisation in the BBRD has very valid intentions and is an important feature of the EU regime for the protection of the international financial system. However, mainly due to deficiencies in the transposition, there is a remaining dependency on the judiciary. On the other hand, complete independence would not be realistic either as the Member State courts are relied upon as the guarantors executing the legislative regime.

D. The consequences of explicit legislative characterisation of OMPs in Directives

Following from the two Directives containing explicit legislative characterisation of OMPs, there are several consequences which should be considered as a basis for improving such characterisation in Directives. First, competency tensions that have to be resolved arise horizontally between the legislators and courts and vertically between the EU and Member States. Secondly, the effect of explicit legislative characterisation on Directives without such characterisation has to be considered, both with regard to the pre-existing Directives and future enactments. Thirdly, it has to be acknowledged that explicit legislative characterisation has a stronger extraterritorial effect on other jurisdictions, which can be problematic if there is no international consensus about the OMP's policy.

1. *Horizontal and vertical tensions of competence*

In terms of competence, explicit legislative characterisation of OMPs in EU Directives leads to greater challenges than the ordinary judicial interpretation and application of a common statutory provision. First and foremost, 'horizontal' tensions can arise between the EU legislator and the Member State legislators on the one hand and the national courts and the CJEU on the other hand in cases concerning the interpretation of explicit OMPs in Directives, such as Art 3 UTPD or

[62]Marc Benzler and Christian Hissnauer, "Derivatives and Bail-in under the EU Bank Recovery and Resolution Directive", in Jens-Hinrich Binder and Dalvinder Singh (eds), *Bank Resolution: The European Regime* (OUP 2016), para 4.23.

[63]Matthias Lehmann, "Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders" (2017) 66 *International and Comparative Law Quarterly* 107, 130; Lehmann (n 50) 14.

Art 68 BRRD, and their national transpositions, such as in the German SAG. Considering the uncertainties and deficiencies identified above, the judicial interpretation of the provisions must at least complement the legislative constructions if not correct them.

Resolving these horizontal tensions between legislators and the judiciary can turn out to be a difficult task. The legislator has supposedly assumed the competence of OMP designation, which displaces judicial interpretation to a large extent, by adopting an explicit legislative characterisation; yet, where the assumed competence has been insufficiently exercised, the judiciary ought to intervene. At best, the judiciary could have a residual competence. However, this would presume that the legislative competence is not exclusive and that the legislator does not refuse what it could regard as undue second-guessing of its specific intentions. Presumably the legislator has not lightly chosen to adopt an explicit legislative characterisation of overriding mandatory provisions instead of leaving it to the judiciary to decide about any characterisation.

Secondly, in terms of 'vertical' tensions of competence, due to the fact that the explicit legislative characterisation is adopted in a Directive which requires transposition into the national law of the Member States, there is a potential conflict between the EU and the Member States. For instance, as discussed above, the transposition of Art 68 BRRD into German law through § 144 SAG does not suggest with the same impetus as the Directive that the provision claims to have internationally overriding reach, but rather seems to suggest that it is only domestically mandatory. To resolve this issue in the realm of national competence with mechanisms available to the EU, the Commission could consider taking action against Germany as a Member State who has failed to transpose the Directive properly,[64] although this seems quite harsh and might be disproportionate. The only viable alternative might be that the CJEU resolves the issue through a preliminary reference procedure, which would prerequire that a national court questions the German transposition in the first place and sees the need to submit such a reference.[65]

Yet, in turn, it will be even more difficult for legislators and courts on the national level to straighten out any inconsistency where it originates in the EU's competence, such as in the superior Directive. For instance, the EU's legislative inconsistency contained within Art 3 UTPD purports that there could be OMPs prescribed in its paragraph 2 that have an international overriding reach but are not domestically mandatory. This poses the complex challenge to Member States resolving the fallacy of derogable OMPs when attempting to fulfil their obligation of correctly transposing the minimum requirements set out in the Directive into their national law. Alternatively, Member States could

[64]Infringement procedure and enforcement action according to Art 258 TFEU.
[65]Preliminary reference procedure according to Art 267 TFEU.

only try to challenge the validity of the Directive's provision on grounds of violation of the EU general principles,[66] such as coherence[67] and legal certainty.[68] If a Member State were to refuse transposition, the Directive itself might however be considered to take direct effect after the transposition deadline has passed,[69] and could perhaps even be considered to contain the directly applicable OMPs, which would be even worse in terms of legal certainty and counterproductive in the eyes of that Member State.

What can be concluded is that unresolved competence tensions are poisonous for explicit legislative characterisation of OMPs because they shake the foundations on which the beneficial legal certainty would be built. On both the EU and national levels, the legislators as well as the courts have to collaborate to ensure that such tensions are avoided or at least seamlessly resolved without any quarrel about prerogatives and responsibilities.

2. *Side effects for pre-existing and future Directives with OMPs lacking explicit legislative characterisation*

Considering possible side effects, the main issue concerns OMPs in Directives predating the Rome I Regulation and in Directives to be adopted in future which are lacking the explicit legislative characterisation because, at best, they are characterised as OMPs by the judiciary. Although there might be a workaround for the pre-existing Directives on consumer protection mentioned in Part I, as they might be given precedence over the Rome I Regulation by virtue of its Art 23,[70] the problem also pertains to other Directives, for instance Directive 96/71/EC concerning the posting of workers,[71] for which the workaround is

[66]Procedurally, as a last resort, there is the annulment action according to Art 263(1), 264(1) TFEU, for which Member States are privileged applicants due to Art 263(2) TFEU.

[67]Art 7 TFEU. Cf Stefano Bertea, 'Looking for Coherence within the European Community' (2005) 11 *European Law Journal* 154; Peter Dieterich, *Systemgerechtigkeit und Kohärenz* (Duncker & Humblot 2014), 559ff.

[68]Case 29/84 *Commission v Germany,* para 23; Case C-360/87 *Commission v Italy*, para 12; Case C-220/94 *Commission v Luxembourg*, para 10; Case C-162/99 *Commission v Italy*, para 22.

[69]See Case 41/74 *Van Duyn*, para 12; Case 148/78 *Ratti*, para 23. Cf Case 8/81 *Becker*; Case C-87/90 *Verholen*, para 12ff; Case C-156/91 *Hansa Fleisch*, para 20; Case C-316/93 *Vaneetveld,* paras 18f; Case C-72/95 *Kraaijeveld*, para 55; Case C-141/00 *Kügler*, paras 52ff; Case C-246/06 *Navarro*, paras 25ff; Case C-138/08 *Hochtief,* paras 24ff.

[70]See above, Part 1.

[71]Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L18/1. Its Art 3(1) is to be characterised as an OMP, which is also acknowledged in Recital 34 Rome I Regulation.

inaccessible.[72] These older Directives might look pale in comparison to the more recent Directives, such as the UTPD and the BRRD, which contain explicit legislative characterisation of OMPs. Since the pre-existing provisions lack such explicit legislative characterisation, they could henceforth be construed as non-derogable provisions only in the light of the systematic and historical interpretation, and could thus be deprived of their status as OMPs. For instance, where the business-to-business restrictions of Art 3 UTPD are transposed into the statutory review of standard contract terms and conditions, their special explicit legislative status of having an internationally overriding reach might differ significantly from the existing provisions for business-to-consumer restrictions, which would then rather seem to be non-derogable only and could be 'downgraded' in their judicial characterisation.

Again, this is an issue to be resolved by the judiciary who might well decide to uphold the previous characterisation of the existing provisions even in comparison to the newly set benchmark of explicit legislative characterisation. Ideally, the legislators on the EU level or at least on the national level would review the existing provisions and update them by transposing an explicit legislative characterisation where appropriate. This would increase legal certainty about whether a certain provision is only domestically mandatory or indeed intends to have internationally overriding reach.

For future Directives, being aware of the Art 9 Rome I Regulation's definition and the precedents of the UTPD and BRRD, it will be vital to clearly include explicit legislative characterisation of OMPs where such intention underlies the adoption of provisions in new Directives. Such new provisions must include the correct term of the Rome I (or II) Regulation across all languages of the Directive and should also include an unequivocal reference to the actual Article of the respective Rome Regulation; this will dispel any potential confusion with only domestically mandatory provisions. Otherwise, if the legislator does not ascertain the characterisation, the resulting void will need to be filled by the courts. However, in contrast to the situation for pre-existing Directives, the judicial interpretation of future Directives cannot neglect the fact that there is the technique of explicit legislative characterisation of OMPs. This could amount to the presumption that newly adopted provisions lacking an explicit legislative characterisation do not intend to qualify as OMPs. At least, the contrary will be much harder to prove.

Additionally, consideration has to be given to another side effect of explicit legislative characterisation of OMPs in Directives because usually Directives

[72]This is controversially debated. In support of the view expressed here see Karl Kreuzer, Rolf Wagner and W Reder, "Europäisches Internationales Privatrecht", in Manfred A Dauses and Markus Ludwigs (eds), *Handbuch des EU-Wirtschaftsrechts* (beck 2020), chapter R, para 235 in contrast to para 184; Dieter Martiny, 'Art. 23 Rom I-VO', in Jan von Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (CH Beck vol 13, 8th edn 2021), para 19.

do not establish complete harmonisation. Explicit legislative characterisations of OMPs in Directives which only establish minimum standards, such as the UTPD, are prone to be affected by a problem which resembles the issue in the *Unamar* case.[73] Simplified, the CJEU approved in *Unamar* that the mandatory provisions in the Member State law which only transposes the minimum standards of a Directive and which was chosen by the parties may be rejected by a court of another Member State in favour of its own forum law where the forum's transposition of the Directive establishes a higher standard.[74]

This means for the explicit legislative characterisation of the OMPs in the UTPD that the EU legislator cannot determine exclusively and exhaustively which characterisations may be made by Member State courts (and therefore which provisions are ultimately applied in a specific case brought before a Member State court). Rather, Member States might transpose a higher standard,[75] or their existing laws may already prescribe a higher standard that contains potential OMPs – subject to judicial characterisation – next to those explicitly characterised OMPs derived from the Directive. Incoherence and uncertainty are to be feared to occur within such a mixed national legal system, and even more so across national legal systems. This could potentially evade or even erode the legislative intention of EU legal harmonisation and specifically of the explicit characterisation – if it is not captured by the courts.

To summarise, pre-existing Directives and their national transpositions which are believed to contain OMPs should be amended to reflect this status through explicit legislative characterisation. For OMPs in future Directives, explicit legislative characterisation will be even more important as there might otherwise be a presumption against their OMP characterisation in court. It is particularly problematic when, similarly to the *Unamar* case, Member States implement higher and diverging standards of OMPs beyond the minimum harmonisation, mixing non-explicitly and explicitly characterised OMPs.

3. *Extraterritoriality: the international significance of legislative intent*

Extraterritoriality in the sense that a legislative act (like a Directive) seeks to have effects outside the (EU) legislator's territorial jurisdiction is a subliminal but not at all inconsiderable effect of OMPs. In principle, extraterritoriality can be attributed to any OMP independent of who has characterised it as such: OMPs seek, depending on their content and policy, to unilaterally determine the scope of their international applicability regardless of the choice of law regime of the forum, let alone the accordingly governing law, as long as the forum is bound by the OMPs. When a case is brought before a court of a Member State, the

[73] *Unamar* (n 5).
[74] Cf McParland (n 4) paras 15.55–56.
[75] Torremans (n 4) 750.

OMP derived from an EU Directive applies extraterritorially in the sense that the forum's transposition of the provision is applied within the context of the otherwise applicable law, possibly within the law of a third State.

Although the phenomenon of extraterritoriality is not unique to explicit legislative characterisation of OMPs, it is amplified when the EU legislator chooses to adopt such characterisation and expresses its universal intention of internationally overriding reach instead of leaving it to the courts to evaluate such characterisation in a specific case. Legislatively prescribing the characterisation of OMPs takes this consequence of OMPs to a whole new level of conflict of laws. It reinforces and politicises regulation through private international law in a globalised world.

This is evident from the two Directives discussed above: whilst the OMP in the BRRD can only be binding in Member State courts, there is no doubt that the BRRD seeks to respond to global risks in the financial system which do not stop at national borders.[76] In order to protect resolution mechanisms against detrimental contractual agreements governed by foreign law, the BRRD extraterritorially suspends such contractual agreements regardless of their applicable law through explicitly characterising the suspending provision as an OMP. Similarly, the UTPD responds to problems in global supply chains by prohibiting unfair trading practices. Thereby, in courts in EU Member States, the UTPD extraterritorially enforces the EU standards on supply chain contracts regardless of their governing law.[77]

Whilst a detailed analysis of extraterritoriality as a phenomenon in a globalised world and an assessment of its benefits and dangers would be beyond the scope of this article, it has to be pointed out that legislators need to beware of the effect they cause, whether intentionally or not, when adopting an explicit legislative characterisation of OMPs. Moreover, countermeasures in the international civil procedural laws of other States have to be considered, through which those States might seek to restrict or reject recognition and enforcement of judgments based on such 'exorbitant legislation'.

Therefore, preferably, explicit legislative characterisation of OMPs should only be pursued circumspectly for internationally agreeable intentions in order to avoid that they are disrespected by foreign States in their courts at least when it comes to recognition and enforcement. Ideally, in turn, foreign courts might even voluntarily appreciate the explicit legislative characterisation of OMPs where they are convinced of their purpose and justification, too. Consequently, the foreign courts might even grant them full extraterritorial overriding reach in adjudicating a case which could never have been brought before European courts but concerns European policies protected by OMPs.

For instance, there is strong international support for the explicitly legislative OMP contained in Art 68 BRRD. The Financial Stability Board (FSB) developed 'Key Attributes of Effective Resolution Regimes for Financial Institutions' as the

[76] See above, Part 2.2.
[77] See above, Part 2.1.

international standard for resolution regimes for financial institutions.[78] In particular, the Key Attributes 4.2 and 4.3 provide for the exclusion and suspension of contractual terms as set out in Art 68 BRRD. Specifically with regard to the global dimension and the need for legislative response, the FSB further demands in its "Principles for Cross-border Effectiveness of Resolution Actions" that provisions on such exclusions and suspensions require 'an appropriate statutory framework' in order to avert the:

> risk that domestic courts enforcing a contract governed by their domestic law may not give effect to a restriction or temporary stay on the exercise of early termination rights … imposed under a foreign resolution regime, or would be unlikely to do so sufficiently promptly to meet the needs of effective resolution in the foreign jurisdiction.[79]

This perfectly validates the extraterritorial ambitions of the explicit legislative characterisation of the BRRD provision.

In contrast, the UTPD solitarily spearheads banning business-to-business trading practices in the cross-border food supply chain as it is not yet backed by international consensus outside the EU. The EU stipulates unilaterally which unfair trading practices shall be prohibited, and it equips these prohibiting provisions with the explicit legislative characterisation of OMPs. At least for the time being, the EU policy to adopt a global supply chain approach where the EU acts as a global regulatory player seems overambitious. On the other hand, criticising the lack of international support does not mean to belittle the EU effort to lead against unfair trading practices, which is particularly important with respect to food supply chains. Nevertheless, due to the fact that supply chains are global nowadays, this pioneering effort might realistically face challenges in terms of recognition in other parts of the world where other standards are applicable that cannot simply be overridden by characterising the EU standards as OMPs, even if done so explicitly legislatively. The EU must not confine its action to the limited tool of EU legislation, it should rather strive for forming an international alliance acknowledging that fair trade in food supply chains is a truly global issue.[80]

Hence, it has to be acknowledged that explicit legislative characterisation intensifies the extraterritorial effect of OMPs. Adopting such characterisation in Directives should be used wisely on the basis of international alignment in order to ensure recognition and enforcement in jurisdictions outside the EU.

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[78] https://www.fsb.org/wp-content/uploads/r_141015.pdf.

[79] https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf p 7. Cf on the significance of FSB guidance for issues of private international law in the field of banking resolution: Lehmann (n 65) 107.

[80] This is not too dissimilar to the more general discussion on fairness and lawfulness in supply chains according to, for instance, Art 13(b) and 17 of the UN Guiding Principles for Business and Human Rights (2011) available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

E. Conclusion

In conclusion, the novel technique of explicit legislative characterisation of overriding mandatory provisions in Directives can be extremely useful to benefit legal certainty if adopted properly. It shifts the traditional paradigm that characterisation of OMPs is solely in the domain of the judiciary. Where the EU legislator chooses to adopt explicit legislative characterisation in a Directive, it requires using the correct term of (and a reference to) Art 9 Rome I Regulation or, respectively, Art 16 Rome II Regulation across all languages of the Directive, so as to avoid any confusion with only domestically mandatory provisions. Equally, the national transpositions must ensure that they correctly implement the explicit legislative characterisation without creating any doubts about the internationally overriding reach. However, these requirements have not yet been fully met by the recently adopted Directives, UTPD and BRRD, or their transpositions into national law respectively. Judicial support is still very much necessary and has not become superfluous at all. Courts are not only needed to resolve problems in the application of the explicit legislative characterisations, but even more so to mitigate inconsistencies in the law and tensions of competency. One must also consider the side effects on pre-existing and future provisions in Directives without explicit legislative characterisations. Finally, it has to be appreciated that the extraterritorial effect of OMPs is intensified by the explicit legislative characterisation, whose adoption therefore requires the legislator to seek international alignment. All these aspects will be highly relevant for future instances in which the EU legislator will decide to adopt explicit legislative characterisation of OMPs in Directives: as a matter of current debate, the European Parliament's resolution of March 2021 requests the adoption of a Directive on corporate due diligence and corporate accountability, which is expected to stipulate in what are not completely legally certain terms that "relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of the [Rome II Regulation]".[81]

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[81] Art 20 of the draft text for a Directive in the resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), P9_TA-PROV(2021)0073.