

**Exporting Privacy:
Adequacy Decisions and the Power of the European Commission**

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Introduction

The European Union (EU) has often been identified by scholars as a certain type of power, whether that be a normative power (Manner, 2002), a market power (Damro, 2012), or a liberal power (Wagner, 2017). In this research the debate about what type of power the EU is will be furthered by examining the power of the European Commission's (from now on referred to as the Commission) power in one specific policy field, namely that of adequacy decisions. Adequacy decisions are decisions by which the Commission may deem the data protection laws of a third country outside of the EU as 'adequate', meaning that personal data from citizens within the EU can safely be transferred to those third countries. The effect of such a decision is that these transfers can be done without any further safeguards since the third country already has an adequate level of data protection. This research will look at what role the Commission plays in shaping the content of these adequacy decisions, and the behaviour of the third countries that adequacy decisions are taken on, answering the research question 'to what extent does the European Commission exert power on third countries through adequacy decisions?'

The thesis will start with a discussion of different conceptions of power in the EU, specifically looking at normative power Europe, market power Europe, and liberal power Europe. These different conceptions of power have shaped the way scholars have analysed the EU over the years of its existence so it will be relevant to understand their background before using them in this research. After that the effectiveness of EU foreign policy will be discussed, focusing on the external governance framework set up by Lavenex and Schimmelfennig (2009), which is used to study EU foreign policy and the effectiveness thereof. It will be argued that, even though the external governance framework has almost exclusively been used to study the European Neighbourhood Policy, the framework can also be applied to countries and policies outside of the EU's neighbourhood. Following these discussions, the theoretical framework will identify the important concepts that are to be used during the analysis: normative power Europe, market power Europe, external governance, and effectiveness. It will elaborate further on the external governance framework as set up by Lavenex and Schimmelfennig (2009) and use articles by Manners (2002),

and Damro (2012) to define normative power, and market power accordingly. In the methodology, these concepts will be operationalized so that they can be used during the analysis. Finally, the analysis will be conducted by examining policy documents related to adequacy decisions taken on both Japan and the United States (US), examining both rule selection and rule effectiveness. The analysis will show how, in the context of adequacy decisions, the Commission exerts a moderate to a high amount of normative power on the third countries involved.

Literature review

Power in the European Union

According to Manners (2002), the EU should be conceptualized as a normative power. The EU is constantly searching to shape the world around it according to what it thinks is 'normal'. From this point of view, the EU does not seek to change the world according to its values because it seeks to get some form of value out of it. Instead, Europe seeks to change the norms and behaviour of other countries, because as a normative actor the EU has an obligation to do so (Manners, 2002). To stop Europe from being a sort of messiah that tells others what to do, because it knows what is right, Diez tells scholars to constantly analyse European norms and values and continue to deconstruct them (Diez, 2005, p. 636). For the EU to construct itself as a normative actor, there needs to be a discourse in which the EU is faced against an 'other'. The four different strategies of constructing the self-versus the other according to Diez are constructing the other as an existential threat, an inferior, a violator of universal principles, or as different (Diez, 2005, p. 628). The first three are value-judgments, meaning the 'other' is deemed worse than the EU, while in the last one the other is simply 'different', while not being inherently worse. The danger in projecting an 'other' as inferior is that the EU runs the risk of mirroring the other's language in attempting to protect its own identity, something that Wagnsson and Hellmann touch upon in their analysis of the work of the *Disinformation Digest* (Wagnsson & Hellman, 2018, pp. 1170–1173). Any research into whether the EU is projecting normative power in a certain policy area needs to scrutinise whether or not Europe runs the risk of portraying the other in such a way that Europe stops being special and becomes just another great power.

At the same time, the concept of normative power Europe is challenged by other conceptions of power, one of them being market power Europe. “[The EU is] a power actor that actively engages in international affairs through the externalization of its economic and social market-related policies and regulatory measures” (Damro, 2012, p. 696). According to Damro (2012), that means that the EU can best be seen as a market power, instead of as a normative power. Research on what type of power the EU exerts in a certain policy area will need to incorporate whether the EU uses market power or normative power, or whether the EU uses the market to influence normative behaviour in third actors. The author says that the best way to analyse this is to “determine whether the EU is more likely to influence the behaviour of others through the projection of its core and minor norms or the externalization of its market-related policies and regulatory measures” (Damro, 2012, p. 697).

A third conception of power is liberal power Europe. This theory stipulates that the EU is made up of liberal democracies, and as such, each decision made by the EU is the result of their liberal political values influencing EU decision-making (Wagner, 2017). On the one hand liberal power Europe is another theory that could contest the theory of normative power Europe, and as such could be included in further research. Wagner (2017) however says that liberal power does not contest normative power per se, but instead complements it. Moreover, since the adequacy decisions in the EU have a supranational element to them, as they are taken by the Commission. Therefore, looking at them through the lens of liberalism is not as interesting as looking at them through the lens of either normative power or market power.

Effectiveness and External Governance

Another lens through which scholars can analyse European foreign policy is the lens of external governance. The concept of external governance was first developed by Sandra Lavenex (2004). According to Lavenex (2004), external governance is a form of rule-extension in which the EU seeks to extend its *acquis Communautaire* (the European community laws) to the Union’s neighbouring countries. The motives behind this norm-extension are not necessarily aimed at giving these countries the option of becoming a member state, but rather at extending the EU’s role as a civilian power, and creating a structure of interdependence with these countries (Lavenex,

2004). The concept of external governance was further extended by Lavenex and Schimmelfennig (2009), who developed a theoretical framework to analyse EU external governance in third countries. They identify three different modes of external governance that can influence policy areas in third countries. Hierarchical governance, where the relationship is one-sided between the EU as a ruler and the third country as being legislated; network governance, where the relationship is equal between the EU and the third country; and market governance, where market demands stipulate the way dynamics shape relations between actors (Lavenex & Schimmelfennig, 2009, pp. 796–800). They further divide each of these modes of external governance to either macro-level governance, which focuses on institutional structures between the EU and third countries, and meso-level governance, which focuses on the effects of the aforementioned modes of governance on individual policy fields (Lavenex & Schimmelfennig, 2009, pp. 796–797). The authors also identify a method of analysing the effectiveness of EU external governance, looking at what type of rules are on the table in international negotiations with a third country, whether the third country adopts these rules, and to what extent the third country actually applies these rules (Lavenex & Schimmelfennig, 2009).

The case for external governance may become increasingly important as the rate at which the EU expands its borders slows down, as the EU seeks to ever expand its relationship with its neighbours (Lavenex & Schimmelfennig, 2009). However, Lavenex & Schimmelfennig (2009) still put emphasis on the fact that external governance is limited to the countries in its neighbourhood. Numerous scholars have researched external governance. Knill and Tosun (2009) studied the strength of external governance in environmental policy in the Union's neighbours. Another research by Vachudova (2014) looks at 'democratization' effects in countries in the Western Balkans that do not necessarily have a prospect of becoming a member state. Schimmelfennig says: "The EU's governance does not stop at the EU's formal borders" (2017, p. 20). He goes on to conceptualize the study of the European Neighbourhood Policy. Yet if the EU's governance extends beyond its borders, then why would we imagine it to be limited to the European Neighbourhood policy? Further research will

have to show whether or not external governance can be applied to countries further outside of the EU's reach, like the United States, Asia, or South America.

Theoretical Framework

The goal of the research is determining to what extent the Commission exerts power through adequacy decisions. The literature review has shown that the two most appropriate forms of power to look at are normative power and market power. Liberal power Europe will not be considered, because the internal make-up of the EU as a group of liberal countries is less relevant when talking about the Commission communicating with third countries outside of the EU. The research will therefore consist of two parts. The first part is identifying what kind of power the Commission exerts through adequacy decisions, and the second part is finding out how much of this power the Commission exerts through adequacy decisions by focusing on the adoption and application of rules from the adequacy agreement by authorities in the third countries. This will be done through the previously discussed framework of external governance. Before discussing exactly how this will be achieved, the theories of normative power Europe, market power Europe, and external governance will be given precise definitions that are to be used during the analysis.

Lavenex (2004) defines External Governance as the EU extending its *acquis communautaire* towards the countries immediately adjacent to its borders, which is a result of dynamics constituting both internal and external foreign policy goals. "Rule-extension towards non-member states may follow functional needs when it is seen to increase the efficiency and problem-solving capacity of internal policies" (Lavenex, 2004). While definitions of external governance often focus on the neighbourhood aspect of the relation (Lavenex, 2004; Lavenex & Schimmelfennig, 2009), the literature review has made an argument for extending this definition to third countries located further away from the EU. Therefore, the thesis will follow the following definition: External governance is a form of rule-extension by the EU towards any non-member state, as a means of extending its *acquis communautaire* towards that third country.

Since adequacy decisions relate to individual policy fields, the research will only focus on external governance at the ‘meso-level’, which focuses on individual policy fields instead of institutional structures between the EU and third countries (Lavenex & Schimmelfennig, 2009). External governance is further divided into three different modes of governance: hierarchical governance, network governance, and market governance (Lavenex & Schimmelfennig, 2009). While the different modes of governance are an important part of the external governance framework, they are not nearly as important for this research as it is difficult to link normative power or market power to either one of the three modes of governance. Therefore, normative power and market power will instead be linked to another part of the external governance framework, namely that of rule selection. According to Lavenex and Schimmelfennig (2009), rule selection identifies the type of rules that are adopted in agreements between third countries and the EU. They suggest that when EU rules are the focal point in the negotiations, meaning that the rules third countries accept are based on EU rules, then external governance has a higher level of effectiveness. Further on in the thesis, it will be discussed how normative power and market power are linked to the mechanism of rule selection. It is important to note, however, that since the Commission makes a judgment on existing data protection rules in third countries, it is not so much the type of rules that end up in the adequacy agreements that are interesting to identify, but rather the rules the Commission selects as comparisons to those existing rules in the third countries. If the Commission decides a certain rule as adequate because it resembles the data protection rules found in the EU’s General Data Protection Regulation (GDPR) then it can still be said that through rule selection the Commission picked EU rules as the focal point for negotiations. Besides the rule selection and the type of power that is connected to it, the level of power the Commission exerts in adequacy decisions will be researched by using two further concepts Lavenex and Schimmelfennig (2009) used in studying the effectiveness of external governance: rule adoption and rule application. Rule adoption focuses on whether the rules as agreed on in the adequacy agreement are actually implemented in the third country, for example by setting up certain frameworks that are required per the adequacy agreement. Rule application takes this one step further and focuses on whether the adopted frameworks function correctly,

for example handling requests by subjects in a satisfactory manner, or the ability by authorities to not only set up a framework to locate illegal activity but also the continued efforts to combat illegal activity per the agreement.

The definition of normative power will follow the idea that the EU was created as a normative actor, who uses its power to act in a normative way in its dealings with the world around it (Manners, 2002). Manners (2002) suggests that there are six different ways in which the EU diffuses these norms to the world around it, but the research will only focus on transference, which is diffusion that happens when the EU trades with third countries. “Such transference may be the result of the exportation of community norms and standards or the ‘carrot and stickism’ of financial rewards and economic sanctions” (Manners, 2002, p. 245). The adequacy decisions can be compared to EU exporting community norms and standards in the form of data protection laws, which makes transference the best form of diffusion to relate adequacy decisions to. This definition of normative power Europe might be too shallow because it does not consider how the narrative about normative power Europe influences the construction of the EU’s identity and the identity of the third countries that are being discussed (Diez & Manners, 2007, p. 183). There is no one distinguishable identity of the EU, but rather the identity of the EU is compound and diverse. The research will not go into further details on this topic, which means that the results of the research cannot be used to reconstruct the identity of the EU as a normative power. Rather, the research can only make claims about what type of power the EU exerts in the specific policy field of data protection.

As discussed above, to determine whether the type of power the Commission has in relation to adequacy decisions, types of power will be linked to rule selection, as the types of rules the Commission focuses on determines whether the Commission is a normative actor in this context or not. If the rules focused on in the adequacy decisions are equal or similar to rules from the GDPR, then the Commission would be more inclined towards normative power, as they care about diffusing the norms of the EU towards third countries in the form of data protection laws.

The conceptualization of the EU as a market power draws on the idea that the EU is primarily a market: “[T]he EU’s identity is not a particular set of collective

norms but rather a comparatively large regulated market with institutional features and interest group contestation” (Damro, 2012, p. 697). This argument is made up of three elements. The first is the EU as a single market, where the EU uses the prospects of entrance, or exclusion, from its enormous market (Damro, 2012). In the case of adequacy decisions, this would imply that data protection laws are diffused towards third countries to widen the market for the flow of personal data. The second element looks at the institutional features of the EU, stipulating that the EU is a regulatory state made up of rules and regulations which gives it a large amount of regulatory expertise, coherence and sanctioning authority (Damro, 2012). These abilities give the EU an edge over third countries in negotiations, which would explain how the EU can demand changes in data protection laws in its negotiations with these third countries. The third element that that of interest contestation. Through this dynamic, the EU’s projection of market power increases as pro-externalization interest groups from within the EU put pressure on the EU’s economic agenda (Damro, 2012). With regards to the adequacy decisions, interest contestation is be related to the GDPR, which looks to intensify rules on data protection on the internal market of the EU. A high degree of pro-externalization groups would mean that these guidelines are also considered in the EU’s negotiations with third countries.

Like with normative power, market power will also be linked to rule selection, in this case to whether or not the Commission focuses on data protection rules from third countries in the context of whether they are in line with more general principles of privacy, or if the rules from the third countries adhere to principles from other third countries or international organizations. This assumes the Commission is not focused on diffusing EU norms to the third country in question, but rather is motivated mostly by lifting restrictions on data protection transfers, which stimulates the economic areas where these types of data transfers are desirable for the actors involved.

Methodology

There are currently thirteen countries that have received adequacy status by the Commission (Table 1). The research will focus on the United States (US) and Japan. These countries have been chosen because they are the most recent additions to the list of countries with adequacy status, and they have the most documents available to

| Country | Adequacy status since (year) |
|--|------------------------------|
| Andorra | 2010 |
| Argentina | 2003 |
| Canada | 2001 |
| Faroe Islands | 2010 |
| Guernsey | 2003 |
| Israel | 2011 |
| Isle of Man | 2004 |
| Japan | 2019 |
| Jersey | 2008 |
| New Zealand | 2012 |
| Switzerland | 2000 |
| Uruguay | 2012 |
| United States (Privacy Shield Framework) | 2016 |

Table 1: List of countries with adequacy status as of 2020

study for the purpose of answering the research question. The relationship with regards to adequacy decisions and the US is different from other countries. This is because the EU and the US set up a specific framework in which the adequacy decision is valid, namely the EU-U.S. privacy shield. Companies can decide to take part in the privacy shield voluntarily, at which point they can freely transfer personal data between the EU and the US. Even though the adequacy decision with regards to the US looks different from the other countries, the US will still be a representative case, because the structure of the adequacy decisions as set out by the Commission is the same regardless of what country or entity it is applied to. On the other hand, any comparison between the US and the other countries will have to consider the unique nature of the US as a superpower and how this affects its relationship with the EU. This relationship extends much further than the Privacy Shield Framework, and other considerations such as trade or defence cooperation likely influences either actor's behaviour towards the other. Japan has been chosen, because it is the most recent addition to the list of countries that have received adequacy status, and therefore it

presents the most representative picture of the Commission's current attitude towards adequacy decisions.

| | Commission implementing decisions | (Annual) Review |
|----------------------|--|--|
| United States | COMMISSION IMPLEMENTING DECISION (EU) 2016/1250 (European Commission, 2016) | First annual review of the functioning of the EU-U.S. Privacy Shield (European Commission, 2017) |
| | | Second annual review of the functioning of the EU-U.S. Privacy Shield (European Commission, 2018) |
| | | Third annual review of the functioning of the EU-U.S. Privacy Shield (European Commission, 2019) |
| Japan | COMMISSION IMPLEMENTING DECISION (EU) 2019/419 (European Commission, 2019) | N/A |

Table 2: Adequacy decision documents

A qualitative content analysis will be used to answer the research question. A qualitative content analysis involves studying the content of the text directly, inferring meaning and intention of the text by looking specifically at the usage of words and phrases (Halperin & Heath, 2017, p. 336). This type of analysis is the best method because it allows for analysis of the adequacy decisions through the policy documents created by the Commission. This is an unobtrusive method of data collection, which makes the data highly reliable and helps reduce bias (Halperin & Heath, 2017). It is also a less resource-intensive method than for example doing an interview or a survey with European policymakers. A qualitative content analysis involves four steps: first, determining the type of documents that will be analysed, second, defining the

categories that these texts will be examined for, third, determining what parts of the texts are important for the research, and fourth, creating a coding scheme to systematically define the categories as set out in the second step (Halperin & Heath, 2017, pp. 348–349).

The research will consist of the analysis of policy documents that outline the adequacy decision taken by the Commission on the US and Japan. There are two sets of important documents that will be analysed in this way (Table 2). The first documents are the commission implementing decisions. These documents set out why the commission has granted adequacy status to the US and Japan. The documents also go into further details on the obligations for the countries. The second set of documents are reviews. For all countries except the US, reviews are to be submitted by the Commission every four years since 2016, which means that for Japan the first review is not available yet. For the US, however, the reviews are submitted annually, so these documents will be used to research the Commission’s response to the functioning of the adequacy decision.

| Rule Selection | Power |
|--|-----------------|
| EU Rules | Normative Power |
| Other rules (Non-EU states, International Organizations) | Market Power |

Table 3: Type of power

| Rule adoption | Rule Application | Level of Influence |
|----------------------|-------------------------|---------------------------|
| Yes | Yes | High |
| Yes | No | Moderate |
| No | No | Low |

Table 4: Level of influence

The research will be conducted in two parts. First, an analysis is conducted on rule selection in both the adequacy documents set up by the Commission for the Japanese adequacy decision and the adequacy document set up for the EU-U.S. Privacy Shield adequacy decision. The first analysis will establish the type of power present in the adequacy decisions. To establish the type of power it will be assumed that when the

rules selected are adopted from similar rules that already exist in the EU, the type of power is normative, while if the rules adopted originate from laws that exist outside of the EU, then market power is the type present (Table 3). Second, all three annual reviews of the EU-U.S. privacy shield will be analysed to determine the effectiveness of the adequacy decisions in the context of the EU-U.S. Privacy Shield. If both rule adoption and rule application are present in the annual reviews, then it is assumed that the level of influence is high. If only rule adoption is present, then it is assumed that there is a moderate level of influence. If neither rule application nor rule adoption is present then it is assumed that there is a low level of influence by the EU on the third country (Table 4). The annual reviews will partially be compared to the adequacy agreement itself, but the analysis will also consider recommendations made by the Commission in one annual review, looking at the change in behaviour by the US in the next annual review.

Analysis

Rule Selection

The analysis will start with the Japanese adequacy decision, followed by the EU-U.S. Privacy Shield adequacy decision. In the case of the Japanese adequacy decision, most of the information that relates to the type of rules the Commission based its decision on can be found in the introduction of the document. The Japanese data protection rules that the Commission based its decision on are laid out in the Act on the Protection of Personal Information (APPI). In the third paragraph, the Commission writes that the assessment is based on whether Japan can guarantee a level of protection that is “essentially equivalent” to the level of protection that European citizens enjoy within the EU (European Commission, 2019, p.1). While this would immediately imply that the Japanese data protection rules are similar to the ones employed within the EU, the same paragraph says the EU Court of Justice determined that “this does not require an identical level of protection” (European Commission, 2019, p. 1). This would then imply the opposite, namely that the rules do not need to adhere to EU data protection rules. The rest of the paragraph, however, shows that the Commission in response to the EU Court of Justice ruling does not look at the exact structure of the Japanese APPI, but rather at the content of the rules and what

they seek to achieve: “The means to which the third country has recourse may differ from the ones employed in the European Union, as long as they prove, practice, effective for ensuring an adequate level of protection” (European Commission, 2019, pp. 1-2). The document then clarifies that the APPI does not need to be an exact copy of the EU data protection rules, and goes on to clarify the abovementioned point: “the test lies in whether, through the substance of privacy rights and their effective implementation, supervision and enforcement, the foreign system as a whole delivers the required level of protection” (European Commission, 2019, p. 2). Furthermore, two paragraphs explicitly name rules from the APPI that closely reflects rules from the GDPR: footnote 21 of the document reads: “This is in line with Article 23(2)(h) of the GDPR” (European Commission, 2019, p. 5); and in paragraph 82 the Commission writes: “Like EU data protection law, the APPI grants individuals a number of enforceable rights” (European Commission, 2019, p. 14). These two passages underline that while the Commission has not specifically looked at whether or not the rules from the APPI are the same as the rules from the GDPR, the GDPR is still used as a reference point for the desired effects of the Japanese data protection rules. In paragraph 171 the Commission concludes that the data protection rules in the Japanese APPI are essentially equivalent to the data protection laws of the EU, meaning they grant adequacy status to Japan (European Commission, 2019, p. 31).

The case of the EU-U.S. privacy shield places most of the important references about what the Commission based its judgment on in the introduction of the adequacy decision. Starting with the fourth paragraph, the Commission says: “The Commission may find that a third country ensures such an adequate level of protection by reason of its domestic law or of the international commitments it has entered into in order to protect the rights of individuals” (European Commission, 2016, p. 1). In the tenth paragraph, the Commission quotes the Court of Justice, emphasising that the data protection laws adopted in the privacy shield do not need to be identical to the data protection laws adopted in the GDPR (European Commission, 2016, p. 2). In the same paragraph, the Commission continues by saying that the third country must offer the same standard of protection of private data as the protection guaranteed within the EU (European Commission, 2016, p. 2). They elaborate on this issue by saying that

the means by which the third country adopts these data protection laws have to be effective in practice when they are different from data protection laws in the EU (European Commission, 2016, p. 2). In paragraphs 14 and 19 the Commission explains how companies that enter the privacy shield framework must commit to a set of principles (European Commission, 2016, pp. 3-4). “As part of their self-certification under the EU-U.S. Privacy Shield, organisations have to commit to comply with the Principles” (European Commission, 2016, p. 4). Therefore, the Principles must be the most important part of the Privacy Shield that companies need to adhere to, and while the Principles are laid out and explained in detail in the later paragraphs, no reference is made to any laws, rules, actors or organizations that these principles are based on. Based on these Principles, the Commission concludes:

In particular, the Commission considers that the Principles issued by the U.S. Department of Commerce as a whole ensure a level of protection of personal data that is essentially equivalent to the one guaranteed by the basic principles laid down in Directive 95/46/EC. (European Commission, 2016, p. 32)

This passage shows that since the Commission does consider the effectiveness of the Principles to be ‘essentially equivalent’ to the principles laid out in the GDPR, they are using the GDPR as the focal point of comparison.

While the analysis shows the Commission has repeatedly mentioned that the data protection rules of the third countries are not expected to be exact replicas of EU data protection rules, the analysis also shows that the Commission does indeed hold the standard of third-country data protection rules to the same standard as the EU’s GDPR. The Commission has emphasized the fact that data protection rules in both the APPI and the Principles are expected to have the ‘essentially equivalent’ effect as rules from the GDPR. This is made clearer by the Commission’s reference to specific laws from the APPI that are ‘in line’ with rules from the GDPR. It must be noted that for the majority of the rules discussed in the policy document such references did not exist, however, the passages from the introduction and conclusions by the Commission do apply to the document as a whole, and the rules as discussed in the policy document do not make references to any other sources of standards for data protection rules either. It can be concluded that the Commission puts the most emphasis on rule

comparison with the GDPR as opposed to other actors or organizations. The Commissions' continued reference of the GDPR in this context, combined with their focus on effectiveness of the data protection, means that the Commission considers the data protection rules contained in the GDPR as the baseline to compare other data protection rules to. If this were not the case then the Commission would have set a more general baseline that data protection rules should adhere to, outside the scope of the GDPR. In the context of norm diffusion, this is a form of transference, as the EU is exporting its values and norms by projecting them on the data protection laws of third countries. Therefore, it can be said that the Commission is using a form of transference when judging the data protection laws of third countries, and therefore the Commission exerts mostly normative power in the context of adequacy decisions.

Rule Effectiveness

In the first annual review the Commission found no instances of rules from the adequacy decision that the US did not apply or adopt, following the reached adequacy agreement. "The annual review has demonstrated that the U.S. authorities have put in place the necessary structures and procedures to ensure the correct functioning of the Privacy Shield" (European Commission, 2017, p. 4). This passage shows the existence of rule adoption. The structure as set up by the U.S. authorities also falls under rule application, as the next passage says 2400 companies had been certified under that structure (European Commission, 2017, p. 4), meaning that it is functioning correctly. Furthermore, the first annual review shows the US authorities had set up a complaint handling and enforcement mechanism, and that an acting Ombudsperson was designated (European Commission, 2017, p. 4), showing further instances of the US adopting rules from the adequacy agreement.

The second annual review shows multiple instances of rule adoption. "The Department of Commerce has further strengthened the certification process and introduced new oversight procedures" (European Commission, 2018, p. 2). This shows a further commitment by the U.S. authorities to adopting rules and setting up frameworks as per the adequacy agreement. The Commission also notes that the Department of Commerce had set up further mechanisms related to Privacy Shield enforcement (European Commission, 2018, pp. 2-3). The functioning of these

mechanisms is made clear by the Commissions comments on the actual workings of the frameworks and mechanisms after they had been set up. For example, the Commission notes: “At the time of the annual review, such spot checks had been performed on about 100 organisations” (European Commission, 2018, p. 3). On top of that, the Commission also wrote that the Department of Commerce was actively searching for false claims of participation, and already found more than 50 companies who were subject to enforcement action (European Commission, 2018, p. 3). This not only shows the correct adoption of the framework but also its correct functioning. In this annual review, the Commission does emphasize a recommendation made in the first annual review, namely that a permanent Ombudsperson was to be assigned to replace the acting Ombudsperson to ensure a more adequate functioning of the Ombudsperson mechanism. However, the Commission writes that the appointment of a permanent Ombudsperson has not taken place yet:

The Ombudsperson mechanism is an important element of the Privacy Shield framework and, while the acting Ombudsperson continues to carry out the relevant functions, the absence of a permanent appointee is highly unsatisfactory and should be remedied as soon as possible. (European Commission, 2018, p. 5)

This shows a clear instance in which the U.S. has failed to adopt and apply a clear rule that was laid out in the adequacy agreement.

The third annual review shows more instances of both rule adoption and application, but also multiple instances in which the U.S. authorities have fallen short of adopting or implementing rules from the adequacy agreement. For example, the Commission points out that companies under the Privacy Shield framework should not be allowed to list their participant status long after their recertification period has passed (European Commission, 2019, p. 4). The Commission goes on to note that the U.S. authorities have actively checked roughly 30 companies a month on compliance with Privacy Shield requirements (European Commission, 2019, p. 4). While this is an instance of rule application, the Commission continues: “However, it notes that these spot-checks tend to be limited to formal requirements such as the lack of response from designated points of contact or the inaccessibility of a company's privacy policy

online” (European Commission, 2019, p. 4). This implies the Commission sees the current enforcement by the U.S. authorities as too limited and not fully in line with the Commission’s interpretation of the adequacy agreement. Therefore, this is at least a partial instance of the U.S. not applying a rule that they had adopted. The same implication is made later when the Commission comments that while the Department of Commerce has been actively searching for false claims of participation, the Commission felt that these searches had been too limited (European Commission, 2019, p. 4). On the topic of EU data subjects making use of the framework, the Commission notes that it functions well, that the data subject’s issues had been resolved, and that the companies going over their requests handled in a satisfactory manner (European Commission, 2019, p. 5), showing the correct rule application of this particular part of the framework. The Commission’s positive note on the numerous enforcement actions undertaken by the US Federal Trade Commission (European Commission, 2019, p. 4), and while that implies a clear case of rule application, the Commission also notes the US authorities’ unwillingness to share certain information regarding these actions, saying that this is not in the spirit of cooperation (European Commission, 2019, p. 4). While not a direct violation of a rule from the treaty, the Commission does signal that current US behaviour is not completely in line with the content of the treaty, which means that rule application is partially absent. In the second annual review, the Commission noted that the position of a permanent Ombudsperson had not been filled (European Commission, 2018), and in this review, the Commission notes that the position has since then been filled and that the mechanism is now ready to be properly used by EU citizens to exercise their rights (European Commission, 2019). The appointment of an Ombudsperson and the correct functioning of the mechanism per the adequacy agreement shows a clear case of rule adoption.

The three analyses of the annual reviews initially show that the US was both adopting and applying rules from the adequacy agreement into the EU-U.S. Privacy Shield Framework, with the Commission not only positively noting that US authorities had succeeded in setting up the framework, but also that the framework was functioning correctly. The Ombudsperson mechanism is a clear case in which the U.S.

authorities initially failed to adopt a clear rule from the adequacy agreement, however, after the second report on the annual review, the U.S. did appoint a permanent Ombudsperson. This shows that the Commission was able to influence U.S. behaviour on this subject. At the same time, there were numerous instances of the U.S. adopting rules from the adequacy agreement, but not applying them to the extent the Commission expects them to. While this could be a matter of subjectivity with both the U.S. and the Commission interpreting rules from the adequacy agreement differently, it does show that the Commission is not able to fully exert pressure on the U.S. authorities to make them behave according to the Commission's interpretation of the adequacy agreement. Apart from the Ombudsperson mechanism, the Commission did not note any clear instances of the U.S. authorities not adopting a certain rule from the adequacy agreement, meaning that rule adoption was present. Rule application could be identified in most cases, and even the cases in which the Commission felt the U.S. authorities fell short of the Commission's interpretation of the meaning of the adequacy agreement, the U.S. authorities were still actively partaking in the privacy shield framework. This means that rule application was mostly present, which places the level of influence the Commission has on the U.S. with regards to the adequacy agreements somewhere between a moderate and a high amount of influence.

Conclusion

Through the use of the external governance framework as set up by Lavenex and Schimmelfennig (2009), this research has analysed the type of power and effectiveness that the European Commission exerts in the field of adequacy decisions. Through an analysis of the adequacy decisions made by the Commission on both Japan and the EU-US privacy shield framework, the research has found that the Commission's main point of focus in judging the data protection rules of third countries is the effectiveness of those rules, rather than comparing the content of the rules to the content of data protection rules in the EU or other international actors. The GDPR is the only concrete focal point used when the Commission judges third country data protection rules, showing that the Commission considers the GDPR as the baseline to compare the other data protection rules to. This form of transference

means that the Commission mostly exerts normative power in the context of adequacy decisions.

Furthermore, the analysis has also focused on the amount of power the Commission exerts in the context of the EU-US privacy shield adequacy decision. The analysis has shown that the US authorities for the most parts have adopted and applied the agreed rules from the adequacy agreement in setting up the privacy shield framework. The analysis has, however, also shown multiple cases in which the US authorities failed to either adopt or apply rules from the adequacy agreement. In some instances, these were specific rules, like with the US authorities' failure to appoint a permanent Ombudsperson, before the Commission threatened them with sanctions during the second annual review. In other instances, the assumed lack of adoption or application of rules did not rest on specific examples from the adequacy agreement, but rather on the Commission's interpretation of the agreement. In these cases, it is difficult to say whether the failure of the US to comply with the Commission's interpretation of the adequacy agreement rules reflects on the amount of power the Commission has on the US authorities, as it might well be the case that, from the US's point of view, they applied and adopted the rules as the adequacy agreement described them. It can, therefore, be said that the Commission exerts a moderate to a high amount of power in the context of the EU-US privacy shield adequacy agreement.

These two analyses have shown that the European Commission exerts a moderate to a high amount of normative power on third countries in the context of adequacy decisions. There are some caveats to this conclusion. Firstly, different underlying mechanisms that have led to the adoption of the adequacy decisions have gone unnoticed in this analysis, because they fell out of the scope of the external governance framework. This does not mean that external governance is not a good theory to analyse the EU's foreign policy, however, it does show that other methods of analysis, like a discourse analysis, might be necessary to get a better idea of the power dynamics at play when the Commission takes adequacy decisions. Secondly, the research was limited by the fact that the Commission has at present not done any reviews on adequacy decisions other than the EU-US privacy shield. This means that the results with regards to the amount of power the Commission exerts come solely

from the context of EU-US relations and that further research has to be done when the first reviews for the other third countries have been released by the Commission. A more in-depth analysis could also be conducted to look at the exact content of the adequacy agreements and to what extent they have been adopted into national law, without using the Commission as a middleman.

Despite these shortcomings, the research still bears relevance when analysing power in the context of the Commission, or the EU as a whole. It has shown that normative power does play a role in the day to day decision making of the Union and its institutions. This research has not attempted to definitively state that the EU primarily uses one type of power over another, or that the EU should be portrayed as a specific type of actor. It is unwise to make such claims without acknowledging the role different types of powers play, both in the context of different policy fields and in the context of the EU's history of being a single market, as different forms of power, like normative power and market power can coexist while still being distinguishable as two different kinds of power (Damro, 2012; Diez & Manners, 2007). This research has, however, shown that it is possible to identify different types of power within a certain policy field. The type of power the EU exerts can be analysed for other policy fields, categorizing the EU as a distinguishable type of power in each individual case. In the end, this would paint a full picture of what the EU exactly is: not an actor categorized as a single type of power, but rather as a diverse actor exerting multiple kinds of power across policy fields.

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Appendix

| Category | Definition |
|-------------------------------------|---|
| T1: reference to EU rules | The data protection rules adopted in the adequacy decision conforms to rules currently enforced within the EU itself |
| T2: reference to other rules | <p>The data protection rules adopted in the adequacy decision conforms to rules not derived from rules currently enforced in the EU, but rather from:</p> <ul style="list-style-type: none"> -international organizations, - the third country the EU is taking the adequacy decision on, -another third country -a higher standard not directly linked to existing rules in any actors |

Table 5a: Coding agenda [1]

| Category | Definition |
|---|--|
| P1: Rule application | The quoted passage shows that one or more rule(s) from the adequacy decision were applied in the third country |
| P2: Rule adoption | The quoted passage shows that one or more rule(s) from the adequacy decision were adopted by the third country |
| P3: No rule adoption and/or rule application | The quoted passage shows that one or more rule(s) from the adequacy decisions were not adopted and/or applicated in the third country. |

Table 5b: Coding agenda [2]

2019/419 Japan adequacy decision (2019)

| Quote | Category |
|--|----------|
| (3) The assessment has to determine whether the third country in question guarantees a level of protection "essentially equivalent" to that ensured within the European Union | T1 |
| (3) As clarified by the Court of Justice of the European Union, this does not require an identical level of protection | T2 |
| (3) The means to which the third country has recourse may differ from the ones employed in the European Union, as long as they prove, in practice, effective for ensuring an adequate level of protection. | T2 |
| (3) The adequacy standard therefore does not require a point-to-point replication of Union rules | T2 |
| (3) Rather, the test lies in whether, through the substance of privacy rights and their effective implementation, supervision and enforcement, the foreign system as a whole delivers the required level of protection | T2 |
| (Footnote 21) This corresponds to the definition of a "filing system" within the meaning of article 2(1) of the GDPR. | T1 |
| (82) Like EU data protection law, the APPI grants individuals a number of enforceable rights. | T1 |
| (171) The Commission considers that the APPI (...) ensure a level of protection for personal data transferred from the European Union that is essentially equivalent to the one guaranteed by Regulation (EU) 2016/679. | T1 |
| (175) On this basis, the Commission concludes that the adequacy standard of Article 45 of Regulation (EU) 2016/679, interpreted in light of the Charter of Fundamental Rights of the European Union, in particular in the <i>Schrems</i> judgment, is met. | T1 |

2016/1250 EU-US privacy shield adequacy decision (2016)

| Quote | Category |
|---|----------|
| (4) The Commission may find that a third country ensures such an adequate level of protection by reason of its domestic law or of the international commitments it has entered into in order to protect the rights of individuals. | T2 |
| (10) In this regard, the Court of Justice explained that, while the term ‘adequate level of protection’ in Article 25(6) of Directive 95/46/EC does not mean a level of protection identical to that guaranteed in the EU legal order, it must be understood as requiring the third country to ensure a level of protection of fundamental rights and freedoms ‘essentially equivalent’ to that guaranteed within the Union by virtue of Directive 95/46/EC read in the light of the Charter of Fundamental Rights. | T1 |
| (14) The EU-U.S. Privacy Shield is based on a system of self-certification by which U.S. organisations commit to a set of privacy principles — the EU-U.S. Privacy Shield Framework Principles, including the Supplemental Principles issued by the U.S. Department of Commerce and contained in Annex II to this decision. | T2 |
| (19) As part of their self-certification under the EU-U.S. Privacy Shield, organisations have to commit to comply with the Principles. | T2 |
| (137) In particular, the Commission considers that the Principles issued by the U.S. Department of Commerce as a whole ensure a level of protection of personal data that is essentially equivalent to the one guaranteed by the basic principles laid down in Directive 95/46/EC. | T1 |

Report on the first annual review of the functioning of the EU-U.S. privacy shield (2017)

| Quote | Category |
|---|----------|
| The annual review has demonstrated that the U.S. authorities have put in place the necessary structures and procedures to ensure the correct functioning of the Privacy Shield. | P2 |
| The certification process has been handled in an overall satisfactory manner and more than 2400 companies have been certified so far | P1 |
| The U.S. authorities have put in place the complaint handling and enforcement mechanisms and procedures to safeguard individual rights | P2 |
| Regarding the latter, an Acting Ombudsperson was designated following the change of Administration in January 2017 | P2 |

Report on the second annual review of the functioning of the EU-U.S. privacy shield (2018)

| Quote | Category |
|---|----------|
| The Department of Commerce has further strengthened the certification process and introduced new oversight procedures. | P2 |
| The Department of Commerce adopted a new process that requires first-time applicants to delay public representations regarding their Privacy Shield participation until their certification review is finalised by the Department of Commerce | P1 |
| Moreover, the Department of Commerce has introduced new mechanisms to detect potential compliance issues, such as random spot-checks and the monitoring of public reports about the privacy practices of Privacy Shield participants. | P2 |
| at the time of the annual review, such spot checks had been performed on about 100 organisations | P1 |
| In the search for false claims of participation in the framework, the Department of Commerce is now actively using a variety of tools, for instance a quarterly review of companies that have been identified as more likely to make false claims and a system for image and text searches on the internet. | P1 |
| As a result of these newly introduced practices and procedures, the Department of Commerce since the first annual review has referred more than 50 cases to the Federal Trade Commission, which in turn took enforcement action in those cases where the referral as such was not sufficient in order to make the company concerned come into compliance. | P1 |
| Finally, although the Commission had recommended the swift appointment of the Privacy Shield Ombudsperson, the position of Under-Secretary in the State Department to whom the office of the Ombudsperson has been assigned had not yet been filled by a permanent appointment at the time of the present report. | P3 |

The Ombudsperson mechanism is an important element of the Privacy Shield framework and, while the acting Ombudsperson continues to carry out the relevant functions, the absence of a permanent appointee is highly unsatisfactory and should be remedied as soon as possible.

P3

Report on the third annual review of the functioning of the EU-U.S. privacy shield (2019)

| Quote | Category |
|---|----------|
| <p>However such a long period in which a company's recertification due date has lapsed while the company continues to be listed as active Privacy Shield participant reduces the transparency and readability of the Privacy Shield list for both businesses and individuals in the EU. It also does not incentivise participating companies to rigorously comply with the annual re-certification requirement.</p> | P3 |
| <p>With respect to proactive checks of companies' compliance with the Privacy Shield requirements, the Department of Commerce introduced in April 2019 a system in which it checks 30 companies each month.</p> | P1 |
| <p>However, it notes that these spot-checks tend to be limited to formal requirements such as the lack of response from designated points of contact or the inaccessibility of a company's privacy policy online</p> | P3 |
| <p>With respect to the Department of Commerce's search for false claims of participation in the Privacy Shield, the Commission noted that the Department of Commerce had continued to conduct searches on a quarterly basis, which has led to the detection of a significant number of cases of false claims,</p> | P1 |
| <p>However, these searches have so far only been aimed at companies that had in some way already been certified or applied for certification under the Privacy Shield (but, for example, were not re-certified). It is important that they also target companies that have never applied for certification under the Privacy Shield.</p> | P3 |
| <p>The Commission positively noted that an increasing number of EU data subjects are making use of their rights under the Privacy Shield and that the relevant redress mechanisms function well</p> | P1 |
| <p>The number of complaints submitted to independent recourse mechanisms increased and were resolved to the satisfaction of the EU individuals concerned.</p> | P1 |

| | |
|--|----|
| Moreover, requests from EU individuals were appropriately handled by participating companies. | P1 |
| As regards enforcement, the Commission noted that since last year, the Federal Trade Commission concluded seven enforcement actions related to Privacy Shield violations, including as a result of the announced ex officio sweeps. | P1 |
| At the same time, in light of the agency's announcement of last year and the assurances provided in the course of the second annual review, the Commission would have expected a more vigorous approach regarding enforcement action on substantive violations of the Privacy Shield Principles. | P3 |
| This approach is not in line with the spirit of cooperation among authorities on which the Privacy Shield is based, and the Federal Trade Commission should find ways to share meaningful information on its enforcement activity, with the Commission and n [sic] with the EU Data Protection Authorities that are co-responsible for the enforcement of the framework. | P3 |
| The Commission welcomes the appointment of Mr Krach as Privacy Shield Ombudsperson, which ensures that the position is filled on a permanent basis. | P2 |
| Both the European Data Protection Board representatives to the annual review and the Ombudsperson confirmed that all relevant steps of the procedure had been triggered and completed in a satisfactory manner. | P1 |
| It was also important to clarify that by using the Ombudsperson mechanism, individuals in the EU can in fact exercise their right to deletion, which is a fundamental element of the right to the protection of personal data. | P2 |