Council of the European Union

Brussels, 26 June 2023
(OR. en)

11088/23

CYBER 172
COPS 349
POLMIL 172
RELEX 796
JAIEX 39
TELECOM 214
CFSP/PESC 928
POLCOM 138
HYBRID 44
DISINFO 51

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
On:	26 June 2023
To:	Delegations
No. prev. doc.:	10526/23
Subject:	Council conclusions on EU Digital Diplomacy - Council conclusions approved by the Council at its meeting on 26 June 2023

Delegations will find attached the above Council conclusions, as approved by the Council at its meeting on 26 June 2023.

ANNEX

COUNCIL CONCLUSIONS

on EU Digital Diplomacy

1. INTRODUCTION

1. In an increasingly challenging geopolitical context, aggravated by Russia's full-scale illegal invasion and war of aggression against Ukraine, the threats to the EU's human rights-based and human-centric model for digital transformation have become more acute and the importance of the leadership of the EU and its Member States on international digital governance is growing. The development of technologies which have a transformative impact on our economy and society, such as Artificial Intelligence, has accelerated rapidly, while the twin digital and green transitions offer a huge opportunity for sustainable development worldwide. The Council therefore underlines the need for a stronger, more strategic, coherent and effective EU policy and action in global digital affairs to confirm EU engagement and leadership. This is essential to strengthen the EU's strategic autonomy, while preserving an open economy. It requires the EU and its Member States to further develop cooperation with partners around the world, bringing together and leveraging all diplomatic and policy tools, and ensuring complementarity and coherence between internal and external policies. To reach those objectives the EU and its Member States need to increase synergies between EU policies and actions, notably in the areas of human rights, cyber, hybrid, and digital. It also implies seeking synergies with policies and actions on science and research, technology, trade, economic security and supply chains. The Council also highlights the need to promote the digital skills and the engagement of young people, and to strengthen cooperation with civil society stakeholders such as academia, cultural and scientific institutions, as well as the private sector and professional associations.

2. Based on the progress achieved in the implementation of 2022 Council Conclusions[1], which spelled out the principles, objectives and tools of EU Digital Diplomacy, built on universal human rights, fundamental freedoms, the rule of law and democratic principles, the Council emphasises the need to enhance the implementation and coherence of all aspects of digital diplomacy by carrying out a set of **priority actions**.

2. PRIORITY ACTIONS

3. The Council calls on the High Representative, the Commission and Member States to continue to respect, protect and promote human rights, democratic processes and the rule of law online just as we do offline, in particular by fostering digital literacy as well as to advance the human-centric and human rights-based approach to digital technologies, such as Artificial Intelligence, throughout their whole lifecycle. In this respect, a risk-based approach and human rights due diligence practices, including regular and comprehensive human rights impact assessments, are needed to ensure alignment of design, development and use of digital technologies with applicable human rights standards in line with the vision of digital humanism and preserving human dignity.

In line with the EU Action Plan on Human rights and Democracy, the EU and its Member States will pay particular attention to protecting the rights of those in vulnerable and/or marginalized situations, including women, youth, children, older people and persons with disabilities, continue to address inequalities, such as the digital gender divide and step up action to strongly oppose and combat all forms of discrimination on any ground with a specific attention to multiple and intersecting forms of discrimination, including on grounds of sex, race, ethnic or social origin, religion or belief, political or any other opinion, disability, age, sexual orientation and gender identity. Priority areas of action will continue to focus on promoting an open, free, neutral, global, interoperable, reliable and secure internet, on the online protection of human rights defenders (HRDs) and the safety of journalists, the fight against Internet shutdowns, online censorship and unlawful online surveillance.

[1] Council Conclusions on EU Digital Diplomacy, 18 July 2022

4. The Council calls on the High Representative, the Commission and Member States to further strengthen cooperation in and with relevant **multilateral and multistakeholder fora** by working in a Team Europe approach, exploring the possibilities of burden-sharing for better coordination on digital issues. To this end, the EU will:

   a) Strengthen its capacity to provide substantive and coordinated guidance on digital issues towards Geneva-based organizations such as the **International Telecommunication Union** (ITU) and **World Trade Organization** (WTO) and strengthen coordination in other important fora where Team Europe increasingly consolidates its role in digital policy development discussions, including the **United Nations**, the office of the **High Commissioner for Human Rights** (OHCHR), **UN Special Procedures**, **UNESCO**, the **Organization for Economic Co-operation and Development** (OECD), the **Organization for Security and Co-operation in Europe** (OSCE) and **Council of Europe** (CoE). In doing so, the EU will ensure close coordination between diplomats on the ground, experts in Brussels and Member State capitals, in order to ensure the implementation of a human-rights based and human centric approach to digitalisation and emerging technologies.

   b) Convey joint positions to secure greater impact in the UN-led processes taking place over the next two years, and which will shape the way the digital matters are managed globally, notably the negotiations of the **Global Digital Compact** (GDC) and close cooperation with the **UN Tech Envoy** in particular on matters concerning Human Rights and the multistakeholder model of Internet Governance which is open, inclusive and decentralised. The EU contributions to the GDC need to be consistently complemented by outreach with partners of the multistakeholder communities.

c) Strengthen the role of the EU in the **International Telecommunication Union** (ITU), by clarifying strategic goals, notably in view of the Plenipotentiary Conference in 2026, developing coordinated positions, including, where appropriate, with other partners in the European Conference of Postal and Telecommunications Administrations (CEPT), particularly on telecommunication standardisation, including future generation such as 6G, radio-communication and development, conducting cross-regional outreach and promoting as a strategic objective the ITU's commitment to achieving universal, meaningful connectivity that respects human rights and fundamental freedoms; and increasing cooperation among EU Member States represented in the ITU Council. The EU should also aim to strengthen coordination in the **International Organization for Standardization** (ISO) and other standard setting fora to ensure that new technologies develop on the basis of interoperable and/or open standards.

d) Seek coordinated EU positions on **candidatures** in the elections for strategic positions to relevant international fora.

e) Work with partners in the **G7** to reinforce the security of critical digital infrastructures, promote data free flow with trust and boost the resilience of global ICT supply chains; further contribute to **G20** goals of sharing technical capabilities with developing countries.

f) Actively engage and make substantive progress towards an ambitious agreement on e-commerce in the context of the **World Trade Organisation (WTO)**, including rules on the data free flow with trust; to take an active part, alongside other members, in the WTO's e-commerce work programme, and to make permanent the moratorium on customs duties on electronic transmissions.

g) Address multilateral issues as an integral part of the **Digital Partnerships and other relevant Dialogues** with countries around the world in order to build consensus around EU positions and promote key principles underpinning the EU's own regulatory framework.

h) Develop coordinated positions **related to the architecture of Internet governance.** Recognising the importance of the issue and critical timeline of the upcoming processes related to **Internet governance**, the Council invites the High Representative, the Commission (assisted by expert fora such as the High Level Group on Internet Governance), and the Member States – through the relevant preparatory bodies and, where appropriate their delegations– to focus on the following key multistakeholder fora. This includes active support of **the Internet Corporation for Assigned Names and Numbers** (ICANN) on issues of strategic importance such as ensuring internet stability, security, and interoperability; enhanced coordination in the **World Summit on Information Society** (WSIS+20) in 2025; and coordination in order to ensure that an improved **Internet Governance Forum** (IGF) remain the main global platform for multistakeholder digital dialogue after 2025, in order to maintain support for the open, global, free, interoperable and decentralised internet including in the context of the negotiations for a **Global Digital Compact**. Opportunities should be further explored to engage with the **Freedom Online Coalition** (FOC).

5. The Council invites the Commission, the High Representative, and Member States to leverage the web of strategically important **bilateral and regional partnerships** through enhanced partnership and cooperation: the EU-US and EU-India Trade & Technology Councils; the Digital Partnerships with Japan, the Republic of Korea, Singapore, and future one with Canada, the EU-Latin America and Caribbean Digital Alliance, and to continue identifying and developing new ones, when and where these are strategically relevant. The pursuit of common digital trade rules with Australia, India, Indonesia, Thailand and possible digital trade negotiations with the Republic of Korea and Singapore, as well as the negotiation on commitments on cross-border data flows with Japan are key elements of the EU's effort to promote **data free flow with trust**. By fully exploiting the potential of these partnerships, the EU can position itself as a leader and partner of choice in global technological development, standardisation and governance and secure deployment of **critical and emerging technologies** such as semiconductors, artificial intelligence, 5G and 6G, subsea data cables, online platforms and quantum technologies.

6. The Council welcomes the progress realised in the EU-US Trade and Technology Council on standards for the development and use of critical and emerging technologies. As stated at the fourth Ministerial meeting in Luleå, Sweden, given the rapid pace of technological developments, the EU and the US are committed to deepening their cooperation on technology issues, including on AI, 6G, online platforms and quantum.

7. The EU stands ready to step up its engagement and cooperation to address common challenges by making our offer more attractive and relevant to our partners' needs. This implies addressing digital divides, promoting and providing cyber-secure **digital public infrastructure**, as well as **digital commons** which contribute to increasing the usability of new technologies and data for the benefit of a society as a whole, offering trusted and secure international connectivity, such as subsea and terrestrial cables, or wireless networks, and taking into account ICT supply chain security as an important element of building a resilient digital ecosystem[2]. With **Global Gateway**, the EU has the means to provide a competitive offer of state-of-the-art digital infrastructure investments combined with the strategic promotion of our technological solutions and standards, with a regulatory and legislative dialogue to make the most of the digital transformation while addressing its risks. Along with capacity-building and targeted regulatory assistance in key areas, such as cybersecurity, platforms, data, AI and digital identity, the EU should promote human-rights-based and human-centric digital transformation. The **Digital for Development (D4D) Hub** is a good example of the Team Europe approach to digital cooperation with partner regions globally. The Council welcomes the **digital economy packages** announced with Nigeria, Democratic Republic of Congo and Colombia, as well as the Global Gateway digital initiatives, and calls on the High Representative, the Commission, Member States, and financial institutions to work in a **Team Europe approach** to expand the number of **Global Gateway** digital projects[3]. In particular, it calls on the **European Investment Bank** to consider enhancing its portfolio of secure digital connectivity investments, including in mobile networks and subsea cables, going forward and invites the Commission to continue the work on developing coordination of export credit facilities for connectivity projects, including together with similar financing instruments of like-minded partners.

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2 See: Council Conclusions on Information and Communication Technologies Supply Chain Security (12930/22)

3 See list of 2023 flagship Global Gateway projects https://international-partnerships.ec.europa.eu/publications/global-gateway-2023-flagship-projects-infographics_en

8. The Council stresses the importance of strengthening cooperation in tackling foreign information manipulation and interference (FIMI), including disinformation, by foreign threat actors, particularly the Russian Federation, including in the context of its war of aggression against Ukraine in the digital space and underlines the importance of stepping up work within the EU, as well as with partners, third countries and other stakeholders, notably online platforms.

9. The Council calls on the High Representative, the Commission, Member States, and financial institutions to strengthen mutual resilience by enhancing digital capacity building and cooperation, notably through the Economic and Investment Plans with partners in the **Western Balkans** and the **Eastern Partnership**, in particular with those partners with an EU membership perspective, as well as in the **Southern Neighbourhood** region, and in line with the Digital Agenda for Western Balkans, the Eastern Partnership's EU4Digital Initiative, and the New Agenda for the Mediterranean.

10. The digital transformation of Ukraine has been a key element of the resilience of its economy and society in its defence against Russian aggression and will be a key pillar of its reconstruction. The Council underlines the need to foster resilience of Ukraine's ICT ecosystem, and reiterates the EU's unwavering support to Ukraine for as long as it takes.

11. In line with the commitments made at the 2022 EU-AU Summit, the Council calls on the High Representative, the Commission, and Member States to enhance digital capacity building and cooperation with **Africa**, as well as to ensure that EU investment in secure digital infrastructure in Africa is coordinated, so that capacity building and support for the development of appropriate policy and regulatory frameworks is prepared in cooperation with the African Union and partners such as Smart Africa, so as to bring an enhanced level of continent-wide partnership that is in accordance with the importance of the relationship between the EU and Africa.

12. The Council calls for the informal **EU Digital Diplomacy Network** to continue to engage in strategic discussions on key emerging and challenging issues of tech and digital policy and regularly to convene in enlarged format, bringing in, as appropriate, other European and like-minded partners, as well as other stakeholders and relevant networks, and to further strengthen its coordination with the EU Cyber Ambassadors' Network.

13. With a view to ensuring a coordinated approach and effective positive outreach on digital matters, the Council invites the High Representative, the Commission and Member States to promote the establishment of **informal digital hubs** in key partner countries, where EU Delegations and Member States' Diplomatic representations work closely together in a systematic and coordinated manner, and engage in information sharing and action on cross-cutting issues with relation to digital and technological development. In order effectively to use those networks, both the EU and Member States should prioritise digital diplomacy resources abroad, continue to reinforce capacity-building and enhance EU coordination on digital matters.

14. Recognising the important role the tech sector can play in the support of the EU's Digital Diplomacy objectives, the Council calls on the High Representative, the Commission, and Member States to explore avenues for coordinated **dialogue and structured cooperation with the tech industry** in key strategic areas, including critical and emerging technologies and secure connectivity, to strengthen the EU's shared approach, as well as its innovation and industrial growth, and promote European standards, regulatory approaches and trusted vendors globally. The efforts should seek to find common ground and aligned strategic visions based on shared values and interests in the intersection of technology development, standardisation, and geopolitics that benefit both the EU and the industry. This should be done including through using the Business Advisory Group set up to ensure private sector involvement in the implementation of the Global Gateway, as well as other frameworks of industrial dialogue on digital such as the Trade & Technology Councils, Digital Partnerships, Dialogues and Alliances, as well as within key standardisation bodies. The experience gained through the engagement of the EU Office in San Francisco with the **tech sector** should be used.

15. The Council underlines that, in order to play a role in shaping digital geopolitics, the EU and its Member States need to scale up their capacities on digital diplomacy including through better cooperation on **training and information-sharing tools**, addressed to EU and Member States diplomats, looking for synergies and sharing best practices between the EU, Member States, academia, private sector, civil society and other relevant stakeholders. The Council invites the High Representative and the Commission to ensure within two years that at least one official in every EU Delegation has relevant expertise on digital diplomacy matters and that diplomats posted in EU Delegations receive relevant training as part of their pre-posting process.

16. The Council will revert to this issue **by summer 2024** and invites the High Representative, the Commission, and Member States regularly to **assess progress** and to continue regularly to report to the Council on digital diplomacy implementation.

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The EU as a Global Digital Actor

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1

EU as a Global Digital Actor

I. Overview: The EU The Internationalist: Becoming a Global Data Actor

In any discussion of the EU as a global actor it is important to remember that the EU appears as a distinctively consistent 'internationalist' in a world recently shifting towards populism and localism. Data institutionalisation can arguably now be understood to be a central part of this global agenda, as driving convergence in data protection laws and practices with global reach and effects of a once proclaimed law-free space, explicitly.[1] The success of the EU as a global data actor is argued here to have largely been constructed through the institutionalisation of data.

Moving towards international standards may inevitably involve deference to technocratic processes, as those of the EU amply demonstrate (it is arguably a specialisation of the EU).[2] However, many of those framing the discourse on global data flow increasingly single out EU data protection law as an impediment to digital trade.[3] Proponents of global data flows label the EU approach to personal data protection as 'overly restrictive', 'onerous', and 'protectionist'. Yet this presupposes a very specific view of the relationship between data and trade.[4] The 'economisation of human rights' other than privacy leads to human rights being instrumentalised for economic ends such as market access and creates tensions of this nature. The GDPR has been said to 'create[s] barriers to cross-border data transfers to such an extent that they are effectively data localization requirements'.[5] The hypothetical consequences for the EU, by frightening estimations, could lead

[1] European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' COM(2017) 07 final; E Fahey, 'The Global Dimension of the EU's AFSJ: On Internal Transparency and External Practice' (2014) Jean Monnet Working Paper Series 2014/4. See also JP Barlow, 'A Declaration of the Independence of Cyberspace' (1996), www.eff.org/cyberspace-independence accessed 23 February 2022.

[2] A Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press, 2013) 189.

[3] S Yakovleva and K Irion, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) *International Data Privacy Law* 201.

[4] ibid; MF Ferracane et al, 'ECIPE Digital Trade Restrictiveness Survey Index' (ECIPE, 2018), https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf accessed 23 February 2022.

[5] M Sharma, 'Approaching Data Localization' (*Medium*, 10 June 2019), https://medium.com/@madhavsharma/approaching-data-localization-cc90282cb975 accessed 23 February 2022.

to a 3.9 per cent loss in the EU's GDP, or up to $193 billion in absolute numbers.[6] It is probably also fair to say that the global debate on privacy has had an upward trajectory, towards the European discourses. The world's social media giants now argue for an EU GDPR and co-locate themselves strategically between Europe and the US and subject themselves to significant regulation. However, it seems fair to say that such views as to data localisation are important to bear in mind in a world of geo-blocking and internet divisions based on borders. More practically, there are many assertions of the unsuitability of the legal instruments used to protect privacy and grapple with surveillance and commercial concerns.[7] The place of setting and context is a broader one also. From a geopolitical perspective, many key questions arise, for instance, within the context of the recent so-called US-China Silicon Curtain or tech war.[8] It raises the question of who was caught in the middle? The G7 countries no longer form a majority of the world's GDP and a significant split amongst G20 countries exists as to their relationship with China; the power balance of the global economy has never been more complex. The EU was also caught in the midst of one of the most complex tech wars ever, relating to the place of 5G, the future of many ICT industries and the place of digitisation in trade, arguably exacerbating the lack of agreement on digital trade.

The GDPR is highly significant because it establishes a coherent and consistent data protection framework by offering a uniform set of substantive rules that are enforced by a network structure of national data protection authorities, who cooperation with each other under the coordination of the European Data Protection Board (EDPB).[9] The resulting architecture is a complex system of bodies at EU and national level who are charged with responsibility for the enforcement of the rules in the GDPR. The sophistication and complexity of this regime is exacerbated by many of the world's social media networks having their European headquarters in

[6] Yakovleva and Irion (n 3).

[7] eg M Kaminski, 'Why Trade Is Not the Place for the EU to Negotiate Privacy' (*Internet Policy Review*, 23 January 2015), https://policyreview.info/articles/news/why-trade-not-place-eu-negotiate-privacy/354 accessed 23 February 2022.

[8] See also M Lewis, 'Criminalizing China' (2020) 111 *Journal of Criminal Law and Criminology* 145, on the China Initiative of the US Department of Justice launched in 2018 to counter national security threats emanating from China.

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1, is a significant attempt on the part of EU law to modernise its approach to data protection and to engage in regulatory coherence in the aftermath of landmark CJEU decisions. The new Regulation is perceived to mark a significant extension of the extra territorial application of EU law with respect to EU and non-EU established companies pursuant to Art 3 thereof and thereby refining the landmark developments begun by the CJEU in Case-131/12, *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317. National authorities had not been satisfied with the pre-existing regime precisely because it had resulted in 'ad hoc transnational enforcement'. The GDPR is thus understood to have generated a process of 'Europeanisation' whereby there is a significant shift from decentralised application of data protection law to centralised enforcement.

Ireland, one of the smallest member states of the EU, with a data protection commission with de facto and de jure capacity to regulate all of Europe – and, by extension of law, many global social medial and tech companies. The scale of the resources and capacity to do is a matter for elsewhere. However, the institutional design of this system and its autonomy has already shown teething problems – as well as evolution and growth: the EDPB adopted its first Article 65 decision in November 2020 with respect to a dispute between the Irish Data Protection Commission and many other DPAs on a draft decision of the DPC concerning Twitter International Company breaching certain GDPR provisions. The respective places of enforcement, oversight, consistency and accountability are to the fore here. In its Grand Chamber decisions, the CJEU has developed significant case law to permit exceptions to the place of Ireland as lead supervisory authority.[10] The effects of such case law remain to be seen. The CJEU has re-emphasised the one-stop-shop in *Facebook Ireland Limited and Others v Gegevensbeschermingsautoriteit*[11] but is aware of the unevenness of resources and alive to risk of institutional forum shopping against that background.[12] However, it is clear that the dense institutional design and autonomy of individual actors furthered by the GDPR continues to be a core metric of its operation and a hallmark of EU regulatory capture of data and global reach.

Chapter 1 contains the following sections: (II) EU global reach over the web; (III) global reach through large-scale data flow regimes; (IV) global alternatives to the GDPR; (V) the EU as a soft data localisation actor; (VI) the EU the emerging digital sovereign; (VII) global capture of Big Tech in data spaces and the DMA/DSA; (VIII) the EU's emerging architectural infrastructure on AI; and (IX) Conclusions.

II. EU Global Reach Over the Web: An Architecture of Scale

Country after country around the world replicates the EU's GDPR.[13] Some struggle with its force and bureaucracy but ultimately comply.[14] However, many of the

[10] See Case C-645/19, *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit*, EU:C:2021:483.

[11] ibid.

[12] L Woods, 'Who Has Jurisdiction over Facebook Ireland? The CJEU Rules on the GDPR "One Stop Shop"' (*EU Law Analysis*, 16 June 2021), http://eulawanalysis.blogspot.com/2021/06/who-has-jurisdiction-over-facebook.html accessed 24 February 2022.

[13] eg Thailand, China, California. See A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

[14] F Lusa Bordin, 'Is the EU Engaging in Impermissible Indirect Regulation of UN Action? Controversies over the GDPR' (*EJIL: Talk!*, 11 December 2020) www.ejiltalk.org/is-the-eu-engaging-in-impermissible-indirect-regulation-of-un-action-controversies-over-the-general-data-protection-regulation/ accessed 24 February 2022.

most extraordinary developments of our times on jurisdictional issues, eg transatlantic 'showdowns' over the US CLOUD Act or liability for intermediaries, show international law-making mediated by major multinational cooperation.[15] Evidence indicates that, for example, Facebook was concerned about a possible change in the liability for intermediaries under the Digital Single Market back in 2015.[16] The E-Commerce Directive governing social media platforms does not hold companies such as Facebook liable for illegal content posted by their users.[17] However, companies must take down illegal content once it has been flagged as such. In 2016, Facebook lobbied that additional liability would be a barrier to Facebook and the new business models on the platform. These efforts were ultimately initially successful, as the E-Commerce Directive was not re-opened and Facebook became a repeat player in lobbying on EU law.[18] Significant regulatory shifts do not look likely under the EU's draft Digital Services Act (DSA), discussed below in further detail.[19] Instead, the 20-year-old legal infrastructure of the E-Commerce Directive remains mostly in place. The Digital Services Act (DSA) is proposed as a regulation rather than a directive, and does not repeal the E-Commerce Directive but builds on it, including the internal market principle found in Article 3 of the E-Commerce Directive. It provides for several types of online intermediary provider and a very broad range of exemptions. It allows intermediaries to continue to benefit from comprehensive liability exemptions so, as a result, will not be held liable for user content. The DSA provides for new due

[15] J Daskal 'Microsoft Ireland, the CLOUD Act, and International Law Making 2.0' (2018) 17 *Stanford Law Review Online*, 9.

[16] L Kayali, 'Inside Facebook's Fight against European Regulation' (*Politico*, 23 January 2019), www.politico.eu/article/inside-story-facebook-fight-against-european-regulation/ accessed 31 December 2021. Facebook Inc has now changed its name to 'Meta'.

[17] ibid.

[18] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

[19] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final; Cf. European Commission, 'Proposal for a Regulation of the European Parliament and Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final; European Commission, 'Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future' (19 February 2020), https://ec.europa.eu/commission/presscorner/detail/en/speech_20_294 accessed 24 February 2022; *cf* C Schmon and K Gullo, 'European Commission's Proposed Digital Services Act Got Several Things Right, But Improvements Are Necessary to Put Users in Control' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/european-commissions-proposed-regulations-require-platforms-let-users-appeal accessed 24 February 2022; A de Streel et al, 'Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age' (2020) CERRE Report, https://cerre.eu/wp-content/uploads/2020/11/CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age_Full-report_December2020.pdf accessed 24 February 2022; M Schaake, 'EU Needs to Think Bigger than Big Tech' (*Tech Monitor*, 27 November 2020), https://techmonitor.ai/interviews/marietje-schaake-eu-think-bigger-than-big-tech accessed 24 February 2022.

diligence obligations for flagging illegal content for all providers of intermediary services, and establishes special type and size-oriented obligations for online platforms, including the very large ones.[20] The largest platforms can be fined up to six per cent of their annual revenue for violating rules about hate speech and the sale of illegal goods. At the time of writing, significant developments were ongoing as to eg improving the criteria for the designation of gatekeepers but clearly reach here is of much significance.

The case law of the CJEU also displays an increasingly reluctant approach to shielding online intermediaries with the immunities of the E-Commerce Directive, though arguably framed more 'glamorously'. Recent case law[21] offers a striking insight into the place of Facebook in the intricate regulatory jigsaw of EU law, in litigation instigated by an Austrian parliamentarian who had asked Facebook to delete a comment that was ultimately found by Austrian courts to be defamatory against her reputation. She had demanded that Facebook delete the post but in a geographically segmented way, including not just the specific post but also identical or equivalent posts. The novelty of the case is that one week previously the Court of Justice (Grand Chamber) had limited the reach of the infamous 'right to be forgotten' developed by the CJEU in 2014 in Case-131/12 *Google Spain*, allowing individuals to request search engines to remove links containing personal information from web results appearing under searches for their names.[22] In Case C-507/17 the CJEU in *Google v CNIL* were confronted with a notice served on Google by the French National Data Protection Authority for links to web pages to be removed from the list of results displayed following a search conducted to apply for removal of all the search engine's domain name extensions.[23] The CNIL regarded Google's geo-blocking proposal as insufficient. The CJEU held that a search engine operator could not, under current EU law, be required to de-reference on all versions of its search engine.[24] Rather, the internet was a global network without borders.[25] Many suggested that *Google v CNIL* would de jure predict the result in *Eva Glawischnig-Piesczek*, and that the latter case could conceivably trigger a global assault on freedom of speech.[26] However, this is arguably not the case. The Austrian Supreme Court in *Eva Glawischnig-Piesczek* asked the CJEU to determine whether the wording of Article 15(1) of

[20] M Eifert et al, 'Taming the Giants: The DMA/DSA Package' (2021) 58 *Common Market Law Review* 987.

[21] Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, EU:C:2019:821.

[22] *Google Spain* (n 9).

[23] Case C-507/17, *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)*, EU:C:2019:772.

[24] ibid para 72.

[25] ibid para 56.

[26] J Daskal and K Klonick 'When a Politician Is Called a "Lousy Traitor", Should Facebook Censor It?' (*New York Times*, 27 June 2019), www.nytimes.com/2019/06/27/opinion/facebook-censorship-speech-law.html accessed 24 February 2022.

Directive 2000/31 covered removal not just of illegal or defamatory information but also other information: (1) worldwide; (2) in EU Member States; (3) of the relevant worldwide user; or (4) of the user in the circumstances. Although willing to consider the extraterritorial effects of EU law, Advocate General Szpunar in his Opinion said that the proceedings did not come within the scope of EU law. He held that Directive 2000/31 had to be interpreted as meaning that it did not preclude a host provider from being ordered to remove information characterised as illegal. In contrast, the CJEU in its decision found that although Facebook was not liable for the disparaging comments that had been posted, it had an obligation to remove comments after they were found to be defamatory. It held that, in view of the global nature of e-commerce, the Directive did not preclude injunctive measures with worldwide effect. The Court found that the lower court had jurisdiction to require the host provider to block access to the information stored. It also held, somewhat cryptically, that global injunctions would be limited 'by the relevant international law', possibly making reference here to issues of comity.[27]

Case C-18/18 exposes a considerable gap between the Court's decision and the Opinion of the Advocate General in the case, who was also the Advocate General in the recent *Google v CNIL* decision. This could be indicative of significant disputes internally in the Court. Arguably, however, the most significant difference between the two cases relates to the role of the latter case as concerning a public figure and political speech. For some, the case gives the green light for global orders against the thrust of the E-Commerce Directive and assumes a level of technological sophistication and specificity that does not exist. What must Facebook (the overarching owner of which has been renamed as Meta, but the Facebook platform name remains unchanged) do? Take down a particular post globally and look for other additional posts?[28] Others argue that it represents an important shift in the burden of proving legal exceptions to 'Big Tech'.[29] Or is there a shift in power inside the Court room?[30] Such cases expose interesting power dynamics, in which EU law continuously intervenes against Big Tech in the realm of data but arguably only goes so far – just far enough for EU institutions to fairly assert that they have considerable ongoing authority over it through the institutionalisation of the web. Facebook has ultimately shown itself to be a Europeanist, as it ostensibly now

[27] *Eva Glawischnig-Piesczek* (n 21) para 53. See A Keane Woods, 'Litigating Data Sovereignty' (2018) 128 *Yale Law Journal* 328.

[28] J Daskal, 'A European Court Decision May Usher in Global Censorship' (*State*, 3 October 2019), https://slate.com/technology/2019/10/european-court-justice-glawischnig-piesczek-facebook-censorship.html accessed 24 February 2022.

[29] D Desierto, 'Human Rights Regulation in the Tech Sector? The European Court of Justice's Facebook Decision and California's AB5 Gig Economy Bill' (*EJIL:Talk!*, 8 October 2019), www.ejiltalk.org/human-rights-regulation-in-the-tech-sector-the-european-court-of-justices-facebook-decision-and-californias-ab5-gig-economy-bill/ accessed 24 February 2022.

[30] Daskal, 'A European Court Decision May Usher in Global Censorship' (n 28).

adheres to significant amounts of EU law, eg the GDPR and voluntary EU codes on hate speech.[31] On the face of it, this is no surprise: 250 million users in Europe contribute 25 per cent of Facebook's global revenue. However, although Facebook stated that it would apply the GDPR in spirit across the globe, in practice matters were different. The company made internal logistical changes to ensure that the GDPR would not circumscribe the majority of its operations, 'quietly' moving 1.5 billion user files from Ireland to the US in April 2018 so that they would hence be governed by US privacy law. Similarly, Google swiftly moved millions of UK Google users to US 'control' post-Brexit in 2020, to reduce the impact of the GDPR and eliminate the possibility of any of those users filing claims in the Irish courts.[32] However, Facebook purportedly remains a 'strong' advocate of EU law, at least as regards certain aspects of data law, even to the point of increasingly advocating for the GDPR to be the global standard, in the absence of any truly global equivalent. It has helped, along with Apple, Microsoft and Google, to create a position where concern for privacy has the same canonical status as freedom of speech does in the US. Privacy has been 'nudged' and is now being touted as Europe's 'First Amendment'.[33] It has also fostered debates and developments on a US Federal Privacy law, pre-empting developments in Californian law.[34] Facebook continues to object to intense efforts on the part of EU regulators to subject it to EU law and to demonstrate EU law's authority over a vast range of evolving regulatory domains. This is both a direct and indirect call for institutionalisation of immense significance.

III. EU Global Reach Through Large-Scale Data Flow Regimes: On Adequacy

Global reach is how pop music, fashion, sport and art achieve critical mass and acclaim. EU law is no different. The GDPR is particularly relevant to the future of global digital trade because it leaves countries that want to access a market of 400 million consumers with no alternative. Such countries must update their

[31] Bradford (n 13); GDPR.

[32] D Ingram, 'Exclusive: Facebook to Put 1.5 Billion Users out of Reach of New EU Privacy Law' (*Reuters*, 19 April 2018), www.reuters.com/article/us-facebook-privacy-eu-exclusive-idUSKBN-1HQ00P accessed 24 February 2022; 'Google Moves UK User Data to US to Avert Brexit Risks' (*Financial Times*, 20 February 2020), www.ft.com/content/135e5b66-53fb-11ea-90ad-25e377c0ee1f accessed 24 February 2022. Africa, Asia, Australia and Latin American are governed by terms of service issued by the company's international headquarters in Ireland: see S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, 2019) Ch 17.

[33] B Petkova, 'Privacy as Europe's First Amendment' (2019) 25 *European Law Journal* 140.

[34] eg C Kerry et al, 'Bridging the Gaps: A Path Forward to Federal Privacy Legislation' (2020), www.brookings.edu/wp-content/uploads/2020/06/Bridging-the-gaps_a-path-forward-to-federal-privacy-legislation.pdf accessed 24 February 2022.

domestic laws to comply with the EU regime or enter into specific individual regimes with the EU.[35] The EU now has data transfer regimes and flows with third countries which count as some of the largest on the globe – eg the EU-US Privacy Shield, 2016, covering over a billion citizens; the EU-Japan Data Adequacy Decision, 2018, relating to the world's largest safe data flow area between the EU and Japan.[36] These regimes evolved through somewhat different legal processes but ultimately hinge upon a process of negotiating convergence. The European Commission has the power to determine, on the basis of Article 45 of the GDPR, whether a country outside the EU offers an adequate level of data protection. In doing so, it examines wider factors such as the country's judicial system, the rule of law and its national security policies. The overall system for data protection must be deemed 'essentially equivalent' to the EU's before a positive decision will be made. The decision is periodically reviewed by the European Commission and it can be revoked at any time. While the European Commission has never revoked an adequacy decision following a review, the CJEU has. It is a complex practice but also an interesting one, where the EU's institutionalisation practices have dominated and where it has had a significant impact on third country partners, sometimes beyond the scope of what was anticipated.

The concept of an 'adequate' level of protection has been significantly developed by the CJEU in Case C-263/14, *Schrems v Data Protection Commissioner*, relating to arrangements with the US, where 'partial' adequacy decisions exist involving self-certification practices, similar to the arrangements in place with Canada. These adequacy decisions do not cover data exchanges in the law enforcement sector, which are governed by the 'Police Directive' (Article 36 of Directive (EU) 2016/680). The notion of adequacy has been put under considerable strain during the Covid-19 crisis, where many key EU partners with adequacy decisions have adopted measures that impinge on privacy or that strengthen surveillance.[37] Adequacy has now also been subjected to extraordinary pressures by the CJEU decision in *Schrems II*, discussed in particular in Chapter 4 below. There, the Court has added layers of complexity to the possibility of truly free flows of data and has presented significant challenges to business and data protection authorities. The capacity of the CJEU to 'insert' itself into the adequacy procedure and upset and overturn adequacy decisions made by the European Commission – reached after immense negotiations – leaves international partners at the mercy of extremely stringent European values. Adequacy in the time of Covid-19 posed many additional challenges, as the activities, freedom and essential health data of all citizens

[35] P Sauvé and M Soprana, 'The Evolution of the EU Digital Trade Policy' in M Hahn and G Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Brill Nijhoff, 2020) 298–99.

[36] See S Stefano, 'The EU as a Global Standard Setting Actor: The Case of Data Transfers to Third Countries' in E Carpanelli and N Lazzerini (eds), *Use and Misuse of New Technologies* (Springer, 2019).

[37] C Docksey, 'The Coronavirus Crisis and EU Adequacy Decisions for Data Transfers' (*European Law Blog*, 3 April 2020), https://europeanlawblog.eu/2020/04/03/the-coronavirus-crisis-and-eu-adequacy-decisions-for-data-transfers/ accessed 24 February 2022.

globally have become an everyday part of life in ways that could not have previously been imagined. The time limitations on adequacy decisions, and the fact that they are capable of being withdrawn, are also of much concern because of their possible impact on partners. Whether EU data protection standards are relevant to data-gathering activities carried out in third countries to combat Covid-19 remains to be seen, not least in those countries who are considered to be handling the crisis most effectively. It is clear that there is an equivocality at root here which is difficult to capture – forcing the world to accept high standards and possibly divorcing Europe from lesser global standards of protection.

The EU's data adequacy system is ultimately highly politicised and institutionalised, as the CJEU has inserted itself into the adequacy process, institutionalising global data flows like no other process, in its extraordinary interventions in its landmark decisions in *Schrems I* and *II* relating to the EU-US Privacy Shield and previous Safe Harbour Agreement.[38] This means that data flow agreements are politicised but also heavily legalised and have autonomously generated a significant jurisprudence and analytical outline. These processes self-evidently present themselves as forms of institutionalisation and have failed because of weak institutionalisation (eg in *Schrems II* where the Ombudsman was found by the CJEU to be insufficiently robust and independent in the EU-US regime). The EU's approach to data flows was originally unilateral and 'treaty-light' in its locus and is now inserted into provisions of its trade agreements in much detail, eg the EU-UK Trade and Cooperation Agreement (TCA), which has significantly evolved its institutional design. These global data flows are subject to layers of bureaucratisation and convergence requirements, which generate significant forms of institutional interaction.

Some contend that the European Commission 'cloaks efforts to promote the spread of EU law in the language of encouraging third countries and international organisations to adopt strong data protection standards'.[39] However, this promotes a rather skewed vision of a process that is an evolution of convergence. The institutional configurations of this transfer of data matter considerably. The EU's data regimes vary in scale and complexity and very much in terms of institutional design. A turn to institutions and deeper forms of institutional oversight, accountability and legitimation is regarded as 'European' or 'EU-centric' and differs substantially from US and Asian models of looser accountability and oversight.[40] The EU-US Privacy Shield came into force in 2017, as a legal instrument intended to replace the US Safe Harbour Agreement, the voluntary self-certification system with public enforcement by the US FTC, which requires US companies to treat data

[38] Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, EU:C:2015:650 (*Schrems I*) and Case C-311/18, *Facebook Ireland v Schrems*, EU:C:2020:559 (*Schrems II*).

[39] C Kuner, 'The Internet and the Global Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press, 2019) 112, 137.

[40] P Schwartz, 'The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures' (2013) 126 *Harvard Law Review* 1966.

on EU citizens as if the data were physically in Europe.[41] As further developed in Chapter 4, it specifically addresses the concerns about data collection and privacy that arose in the case of *Schrems I*.[42] In 2018, the European Parliament threatened to vote for suspension of the Privacy Shield unless considerable changes were made, to comply with EU data protection rules on clarity on data control, remedies and oversight. It remains the subject of much scrutiny and litigation.[43] The CJEU ultimately struck down the Privacy Shield in *Schrems II*, drawing attention to its weakly institutionalised oversight *and* US surveillance laws.[44] The development of a Trans-Atlantic Privacy Framework Agreement comprises a court and robust independent scrutiny mechanisms. Will the mechanisms developed after the decision be understood as institutionalisation of EU-US relations?

Other regimes are important too: the US regime is not in fact the only large-scale regime of significance. In 2018, the EU and Japan agreed to recognise each other's data protection systems as 'equivalent', to allow data to flow safely between the EU and Japan.[45] The EU maintains that its mutual adequacy arrangement will create the world's largest area of safe transfers of data based on a high level of protection for personal data and also complement the EU-Japan Economic Partnership Agreement (EPA), though not a leading innovation in trade terms.[46] It is thus another significant global endeavour, ostensibly creating global reach. The instruments surveyed now constitute some of the broadest and increasingly important global legal instruments adopted, with enormous regulatory reach across the Atlantic and global territory, literally and metaphorically, and show the scale of the EU's intent. Substantial critique has been levied against the EU-Japan data adequacy agreement for its lack of both institutionalisation and transparency.[47] Countries 'closest' to the EU in terms of agreements reached often have partial adequacy decisions (eg EU-US). The EU-Japan agreement is heralded as one of the most far-reaching of all time in terms of 'area' *qua* adequacy decision. What forms of checks and balances are appropriate and sufficient of this space?

[41] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (notified under Document C (2016) 4176) [2016] OJ L207/1.

[42] *Schrems I* (n 38).

[43] 'Civil Liberties MEPs Want EU-US Privacy Shield Suspended by September' (*Euractiv*, June 2018), www.euractiv.com/section/data-protection/news/civil-liberties-meps-want-eu-us-privacy-shield-suspended-by-september/ accessed 24 February 2022.

[44] *Schrems II* (n 38).

[45] Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA) [2018] OJ L330/3; EU-Japan Adequacy Decision: Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information (EU-Japan Adequacy Decision) [2019] OJ L 76/1.

[46] H Suzuki, 'The New Politics of Trade: EU-Japan' (2017) 39 *Journal of European Integration* 875.

[47] M Bartl and K Irion, 'The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun' (2017) Amsterdam Centre for Information Law Institute Working Paper, www.ivir.nl/publicaties/download/Transfer-of-personal-data-to-the-land-of-the-rising-sun-FINAL.pdf accessed 24 February 2022.

How can the concerns of civil society be abated? What evidence is there of 'learning' in institutional design? What role is given to civil society in the development of initiatives to abate concerns? And what about regimes that appear to fail to enforce any theoretical rights?

The EU-Japan adequacy decision was also said to complement the EU-Japan EPA.[48] However, it has been criticised for the ease with which Japan received the decision relative to its capacity to satisfy a stricter view of equivalence, and so the politicisation of the process has come to the fore. While the EU is typically described as a global actor in trade, the EU-Japan trade negotiations and the parallel data adequacy negotiations provide a setting to study how the EU actorness in data has developed alongside its actorness in trade.

China is an extraordinary potential partner for the EU. It has adopted EU law GDPR principles and relevant case law into its recent cybersecurity law, yet it severely restricts the regulation of data and appears to constitute a form of reverse Brussels Effect. An adequacy decision with China seems increasingly unlikely and improbable. It is only recently, after years of dialogue, that China is beginning to engage with the EU in trade in a legalistic sense. China has notably for years only engaged with individual Member States on law enforcement. This sits against a broader backdrop of many EU Member States engaging with China's Belt and Road Initiative (BRI) whilst the EU was taking part in rounds of negotiations with China on an investment agreement; this is considered further in Chapter 6.

Nonetheless, the reviews of all EU adequacy decisions planned in 2022, of all 14 to date, including high-profile decisions with the UK and Korea in 2021, make this likely to become an extraordinary period of reflection on the future of convergence with EU values and the institutional design structures of the adequacy process itself.

IV. Global Alternatives to the GDPR Lack Institutionalisation

As human rights go, privacy is relatively new; Samuel Warren and Louis Brandeis were the first to advance the notion that privacy is a right deserving of legal protection.[49] Privacy is distinctive among the core civil and political rights, because it was enshrined in international law before it was comprehensively guaranteed by any domestic constitutional system.[50] Prior to the adoption of the Universal

[48] Suzuki (n 46).

[49] S Warren and L Brandeis, 'The Right to Privacy' (1980) 4 *Harvard Law Review* 193.

[50] S Schulhofer, 'An International Right to Privacy? Be Careful What You Wish For' (2016) 14 *International Journal of Constitutional Law* 238; V Krishnamurthy, 'A Tale of Two Privacy Laws: The GDPR and the International Right to Privacy' (2020) 114 *American Journal of International Law Unbound* 26; D Cole and F Fabbrini, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' (2016) 14 *International Journal of Constitutional Law* 220.

Declaration of Human Rights (UDHR) in 1948, a tiny number of domestic legal systems had only protected certain aspects of what we now consider the right to privacy.[51] The *travaux préparatoires* of the UDHR, the ICCPR, and the European Convention on Human Rights indicate that the right to privacy was included as an afterthought. Some illumination of the meaning of the right to privacy enshrined in Article 17 of the ICCPR may be found in General Comment 16, which the UN Human Rights Committee adopted in 1988 and which recognises that the right to privacy 'is required to be guaranteed against all [arbitrary or unlawful] interferences and attacks whether they emanate from State authorities or from natural or legal persons'.

As Krishnamurthy states,

> the GDPR certainly provides the strongest privacy protections of any law in the world today for those matters within its material scope. No comparable law endows individuals [...] with such strong rights over data relating to them, and no other law imposes such strong conditions on the collection and use of personal data by private- and public-sector entities [...]. This is doubtless why privacy campaigners around the world have held up the GDPR as a model that their own jurisdictions should emulate.[52]

However, it is 'neither sufficient on its own to comprehensively protect the right to privacy, nor a necessary means for states to meet their obligations under Article 17 of the ICCPR'.[53] Arguably, other international standards such as the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR) could become geographically more significant in the advent of broader membership, particularly from larger jurisdictions, such as the UK post-Brexit, if it joins the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) successfully. The 'first-mover' advantage of the EU in data regulation is arguably frequently over-stated as to its reach – data privacy comprises only one specific facet or contour thereof. Digital trade is frequently omitted from this analytical rubric yet is the site of significant developments as the EU attempts to evolve its global actorness into trade agreements.

In *The Brussels Effect: How the European Union Rules the World*, Bradford describes how EU regulations impact standards around the world through the process of unilateral regulatory globalisation.[54] There is a significant challenge in formulating EU global action in law and its effects. Many authors diverge on its precise delineation as a subject field and also as a methodological question. The EU is not a unified or homogenous global actor. The precise movement of EU rules beyond borders is also highly contested as an idea across disciplines. Arguably one of the clearest accounts is as to the digital economy in relation to the acceptance by leading social media tech giants in the US of EU law principles, from hate speech to the GDPR.[55]

[51] Krishnamurthy (n 50).

[52] ibid 28.

[53] ibid 29.

[54] Bradford (n 13) Ch 5.

[55] ibid Ch 5.

When dealing with transborder data flows, the EU is faced with different systems of personal data protection, which has resulted in both fragmentation and competition in standard setting. As trade and the global economy rely ever more on data, countries from North America to Asia are becoming aware of the importance of data flows in trade and potential challenges for data protection, which explains the increase of regulation on cross-border data flows in recent years.[56] Legal frameworks at the international and regional level have existed since the 1980s, under the auspices of the UN,[57] the OECD,[58] the APEC Privacy Framework, the Council of Europe Convention 108.[59] One week before the GDPR came into force in 2018, the modernisation of data protection Convention 108 was completed by the Council of Europe.[60] Most arguments as to the force of Convention 108+ assume a controversial understanding of the reach of the jurisprudence of the Council of Europe and European Court of Human Rights, which seems difficult to maintain.[61] Convention 108+ lacks a sanctions regime and significantly lacks extraterritoriality in the sense of the GDPR – thus lacking 'bite'.[62] The CBPR system was first established in 2011 by the APEC as a 'regional economic forum' of 21 Asia-Pacific member economies.[63] The APEC Privacy Framework is a set of principles and implementation guidelines that were created in order to establish effective privacy protections that avoid barriers to information flows, and ensure

[56] C Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, 2013) 10.

[57] General Assembly of the United Nations, 'Guidelines for the Regulation of Computerized Personal Data Files' UN Doc.E/CN.4/1990/72 of 14 December 1990.

[58] OECD Council Recommendation, 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data' (OECD, 1980).

[59] Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (1981) CETS 108 28 January 1981.

[60] G Greenleaf, '"Modernised" Data Protection Convention 108 and the GDPR' (2018) 154 *Privacy Laws and Business International Report* 22; C Sullivan, 'EU GDPR or APEC CBPR? A Comparative Analysis of the Approach of the EU and APEC to Cross Border Data Transfers and Protection of Personal Data in the IoT Era' (2019) 35(4) *Computer Law & Security Review* 380; G Greenleaf, 'Renewing Convention 108: The CoE's "GDPR Lite" Initiatives' (2016) 142 *Privacy Laws & Business International Report* 14; LA Bygrave, 'The "Strasbourg Effect" on Data Protection in Light of the "Brussels Effect": Logic, Mechanics and Prospects' (2021) 40 *Computer Law & Security Review* 1; G Greenleaf, 'A World Data Privacy Treaty? "Globalisation" and "Modernisation" of Council of Europe Convention 108' in N Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014) 92.

[61] eg Bygrave (n 60) 3: '... the Strasbourg Effect on data protection did not begin with the adoption of C108 +. Ever since the 1970s, the CoE has been enormously influential in shaping regulatory discourse in the field, primarily within Europe but also beyond'. See ibid 10. There is currently little appetite in major economies outside the EU to accede.

[62] G Greenleaf, 'Modernised Data Protection Convention 108 and the GDPR' (2018) 154 *Privacy Laws and Business International Report* 22–23.

[63] Like the EU GDPR, the CBPR also governs the transfer of personal information across the borders of participating nations. To date, eight nations have joined the CBPR system: the US, Canada, Mexico, Japan, Singapore, Taiwan, Australia and the Republic of Korea; G Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (Oxford University Press, 2014); G Greenleaf, 'The Right to Privacy in Asian Constitutions' (2020) University of New South Wales Law Research Series No 53.

continued trade and economic growth in all 27 countries of the APEC region. The APEC Privacy Framework set in motion the process of creating the APEC CBPR system. However, unlike the GRPR – which is a binding regulation that applies to all EU countries – the CBPR is a voluntary, principles-based framework that only extends to APEC members that have formally joined.

The CPTPP includes commitments to privacy in its Chapter 14 (on e-commerce), but *without* specifying the APEC CBPR. TPP endorsed the 'Silicon Valley Consensus' mainly as to data governance, preventing its parties from restricting transnational data flows and from requiring the use of domestic computing facilities.[64] However, it let the mere existence of a legal framework for the protection of personal information suffice.[65] Yet, CPTPP is arguably a good example of how trade negotiators might understand the importance of data governance questions. Regulators and trade negotiators have in the main long operated without reliable data about the global digital economy and continue to overlook the losers of the digital transformation, underappreciate the right to regulate and misjudge the extent to which global digital corporations transcend territorial jurisdictional boundaries.[66] CPTPP is also notable because it interested countries with privacy authorities which were members of the Asia-Pacific privacy authorities' forum and institutionalised intersections. With respect to the e-commerce chapter, the CPTPP text remains the same as that found in the earlier versions of TPP, particularly with regard to the key provision, Article 14.8 on personal information protection, which imposes positive obligations on each party to maintain or adopt a legal framework that provides for the protection of the personal information of the users of electronic commerce. It includes references to broader international frameworks, possibly the APEC CBPR system.[67] This raises the question of the meaning of 'globalness'.

In 2017, 44 trade agreements were shown to have established specific provisions on personal information protection.[68] By 2021, data suggested truly significant global convergence on personal data protection laws: over 98 per cent of

[64] T Streinz, 'Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy' in B Kingsbury et al (eds), *Megaregulation Contested* (Oxford University Press, 2019).

[65] See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Art 14.8 (personal information protection), Art 14.11 (cross border transfer of information by electronic means) and Art 14.13 (location of computing facilities).

[66] See eg Streinz (n 64) 313; M Burri, 'Data Flows and Global Trade Law' in M Burri (ed), *Big Data and Global Trade Law* (Cambridge University Press, 2021); G Greenleaf, 'Looming Free Trade Agreements Pose Threats to Privacy' (2018) 152 *Privacy Laws & Business International Report* 23; E Oh, 'Digital Trade Regulation in the Asia-Pacific: Where Does It Stand? Comparing the RCEP E-commerce Chapter with the CPTPP and the JSI' (2021) 48 *Legal Issues of Economic Integration* 403.

[67] Notably the UK intends to pursue accession to the CPTPP as part of its trade negotiations programme.

[68] J-A Monteiro and R Teh, 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) WTO Working Paper ERSD-2017-11, 51.

nations have a personal data protection law and 64 per cent have a comprehensive approach.[69] The overall picture is still one of extraordinary legal fragmentation,[70] reflecting divergent approaches, preferences and priorities, split between the EU's high standards and the self-regulatory approaches of the US and Asia.[71] In addition to national legislation, less than ten years ago there were around 10 binding bilateral agreements and instruments to govern transborder data flows in place,[72] as well as a series of private sector instruments, such as contractual clauses and non-binding codes of practice.[73] Elsig and Klotz have analysed 91 digital trade-related provisions in 347 trade agreements signed 2000–2019, and find that almost half (48 per cent) of such provisions were first introduced in trade agreements to which the US is a member.[74] These developments demonstrate why there is no global standard on privacy and nothing coming close to rivalling the GDPR; but still, it is only one facet of the overall 'jigsaw'.

Calls for a global regulatory framework have not dissipated even in the US, as discussed in Chapter 4. In the face of rising expectations of digital protection, there are increasingly calls for 'global data laws'[75] and 'international privacy standards'.[76]

[69] See the Digital Trade and Data Governance Hub: https://datagovhub.letsnod.com/ accessed 24 February 2022.

[70] Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 26.

[71] RH Weber, 'Transborder Data Transfers: Concepts, Regulatory Approaches and New Legislative Initiatives' (2013) 3 *International Data Privacy Law* 117.

[72] ibid. See Binding Corporate Rules: Article 29 Working Party, 'Working Document setting up a framework for Binding Corporate Rules' (WP 154, 24 June 2008); Standard Contractual Clauses: Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council [2010] OJ L39/5; Commission Decision 2004/915/EC of 27 December 2004 amending Decision (EC) 2001/497 as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries [2004] OJ L385/74; Safe Harbor Privacy Principles issued by the US Department of Commerce on 21 July 2000, and recognized as 'adequate' under European Commission Decision 2000/520/EC of 26 July 2000 [2000] OJ L215/7; Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service [2008] OJ L213/49; Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security [2012] OJ L215/5; Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11; Reports by the High Level Contact Group (HLCG) on information sharing and privacy and personal data protection (23 November 2009); Infocomm Development Authority of Singapore (IDA) and the National Trust Council of Singapore (NTC) Voluntary Model Data Protection Code for the Private Sector; Madrid Resolution 'International Standards on the Protection of Personal Data and Privacy' (non-binding); Treasury Board of Canada, 'Taking Privacy into Account before Making Contracting Decisions' (2006).

[73] Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 21.

[74] M Elsig and S Klotz, 'Initiator Conditions and the Diffusion of Digital Trade-related Provisions in PTAs' (2021) *International Interactions*.

[75] See eg Satya Nadella, Microsoft CEO, in D Hurst, 'Japan Calls for Global Consensus on Data Governance' (*The Diplomat*, 2 February 2019), https://thediplomat.com/2019/02/japan-calls-for-global-consensus-on-data-governance/ accessed 24 February 2022.

[76] P Fleischer, Global Privacy Counsel, 'Call for Global Privacy Standards' (*Public Policy*, 14 September 2007), https://publicpolicy.googleblog.com/2007/09/call-for-global-privacy-standards.html accessed 24 February 2022; C de Terwangne, 'Is a Global Data Protection Regulatory Model Possible?' in S Gutwirth et al (eds), *Reinventing Data Protection?* (Springer, 2009).

[77] P de Hert and M Czerniawski, 'Expanding the European Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in Its Wider Scope' (2016) 6 *International Data Privacy Law* 3; PM Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 *New York University Law Journal* 771; Yakovleva and Irion (n 3); Krishnamurthy (n 50).

[78] eg Amendments to the Council of Europe Budapest Convention, discussed in Ch 3 below.

[79] eg the Phaedra project: www.phaedra-project.eu/the-phaedra-project/ accessed 31 December 2021.

[80] A Regalado, 'Who Coined "Cloud Computing"' (*MIT Technology Review*, 31 October 2011), www.technologyreview.com/2011/10/31/257406/who-coined-cloud-computing/ accessed 24 February 2022.

[81] eg 2018 BSA Global Cloud Computing Scorecard: https://cloudscorecard.bsa.org/2018/ accessed 31 December 2021.

[82] A Chander, 'Googling Freedom' (2011) 99 *California Law Review* 1, 20.

[83] See A Chander and U Lê, 'Breaking the Web: Data Localization vs. the Global Internet' (2014) UC Davis Legal Studies Research Paper No 378, https://ssrn.com/abstract=2407858 accessed 24 February 2022.

Nonetheless, the EU has the advantage of being the 'first mover', and also the first mover with the highest standards and some of the deepest institutionalisation to date, as well as ambitious extra-territorial reach to follow through on its internationalist ambitions in generating a global standard.[77]

V. Is the EU a 'Soft Data Localisation' Actor?

Data transfers are one of the most significant and complex areas that the EU attempts to regulate. The EU has invested much political and legal capital in transnational cooperation and cross-border data regulation projects.[78] It has also, however, invested soft power resources into them too.[79] Information control is central to the survival of authoritarian regimes but is also a device with many economic and social benefits and challenges. One useful area for 'narrower' reflection, where the EU appears to increasingly push for institutionalisation, is cloud computing. The origins of cloud computing are disputed but it is understood to date back to around 2010, when it had complex vague contours.[80] Far from being vague, cloud computing has dictated how companies, business and consumers alike store, utilise and assess data. This revolution has led to security issues, with an increasing number of countries asserting the need for a national cloud.[81] The circularity in the processes of evolution here are remarkable. Data localisation requirements may ultimately prevent access to global cloud computing services.[82] While governments assume that global services will simply erect local data server farms, this may mean that local companies are denied access to the many companies that might help them scale up, or to go global.[83] In the European Commission's Data Strategy of 2020, the European Commission has proposed to invest and developed a cloud infrastructure to store and process data in Europe and to support European

cloud providers in a significant attempt to bolster the institutionalisation of data through localisation.[84] Prior to this, the European Commission proposed to create an enabling and trust-building policy framework for cloud services in Europe. The European Cloud Initiative of 2016 presented a strategy for public investments to build European Open Science Cloud and European Data Infrastructure, building upon the 2012 European Cloud Strategy.[85] These are significant institutionalisation investments on the part of the EU in grounding cloud computing on EU soil. This increasing territorialisation of data is, of course, not uncontroversial.

Cross-border data flows are hallmarks of twenty-first century globalisation and perceived as 'glue' holding the global economy together.[86] One estimate shows that cross-border data flows added $2.8 trillion to world GDP in 2014.[87] Their valuation process is computationally complex.[88] It is not only the sheer amount of data and global dependence on data that has exponentially increased; there are more actors – specifically governments – seeking to assert control over global data flows. From China to Europe and beyond, there are many important examples arising as to control of data flows. A new generation of regulation of internet controls seeks to keep information from going out of a country rather than stopping it from

[84] See European Commission, 'Shaping Europe's Digital Future: Cloud Computing' (Policy), https://ec.europa.eu/digital-single-market/en/cloud accessed 24 February 2022.

[85] See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Cloud Initiative – Building a competitive data and knowledge economy in Europe' COM (2016) 178 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Unleashing the Potential of Cloud Computing in Europe' COM (2012) 529 final.

[86] WG Voss, 'Cross-Border Data Flows, the GDPR, and Data Governance' (2020) 29 *Washington International Law Journal* 485.

[87] US Department of Commerce, 'Measuring the Value of Cross-Border Data Flows' (2016) 2, www.ntia.doc.gov/files/ntia/publications/measuring_cross_border_data_flows.pdf accessed 24 February 2022; McKinsey Global Institute, 'DigitalGlobalization: The New Era of Global Flows' (2016), www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows accessed 24 February 2022; McKinsey Global Institute, 'By 2025, Internet of Things Applications Could Have US$11 Trillion Impact' (2015), www.mckinsey.com/mgi/overview/in-the-news/by-2025-internet-of-things-applications-could-have-11-trillion-impact accessed 24 February 2022; Voss, 'Cross-Border Data Flows, the GDPR, and Data Governance' (n 86).

[88] A Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (Palgrave, 2020) 164 and 225. See OECD Digital Economy Papers, 'Measuring the Economic Value of Data and Cross-border Data Flows' (*OECD*, 26 August 2020), www.oecd-ilibrary.org/docserver/6345995e-en.pdf?expires=1605107203&id=id&accname=guest&checksum=7631AE9F2929B79DAB35E25BC1124DEE accessed 24 February 2022. Cross-border data flows include in one US government taxonomy the following interesting outline: 1) Purely non-commercial data traffic, including government and military communications; 2) Transaction data flows between buyers and sellers at a market price, including direct purchases between buyers and sellers, such as in online banking or advertising, and services transactions that involve digital platforms acting as intermediaries between buyers and sellers; 3) Commercial data and services exchanged between or within businesses or other related parties, including supply chain, personnel, or design information; 4) Digital data and services delivered to and from end-users, including free email, search engine results, maps and directions, and information via social media: see US Department of Commerce, 'Measuring the Value of Cross-Border Data Flows' (n 87) 3.

entering the sovereign state space. It is arguably a clear example of the global institutionalisation of data flows. Some contend that this is not a new phenomenon and is in fact widespread, as a form of informational sovereignty.[89] Arguments for and against extending such boundaries to the Internet are arguably reflected in the debate from the late 1990s and early 2000s between David Post and Jack Goldsmith with regard to closed electronic networks.[90] As Kuner eloquently puts it, the transfer of national borders to the online space reflects society's ambivalence about globalisation: on the one hand, we are all accustomed to the global availability of goods and services, but on the other hand, we are unsettled by the breakdown of barriers that threatens national and regional identities which makes us suspicious and uneasy about barriers to data flows.[91]

One important way of viewing these developments is to consider them through the lexicon and prism of the phenomenon of data localisation. Data localisation is a growing phenomenon where globally more attempts are made to impose structures, architecture, actors, controls, reviews and access controls on data. Data localisation is a complex trend to regulate because it is about *reducing* access to data and digital technologies. It seems to address cybersecurity concerns of data vulnerability by requiring data to be kept in a single jurisdiction, making it easier to target and possibly preventing data back-ups in globally distributed data centres.[92] However, data localisation also raises the costs of access to, and use of, data, thereby reducing gains from digital trade.[93] Of course, data localisation laws affect businesses and ordinary individuals in countries in various ways: data localisation is a cost that possibly falls disproportionately on digital exporters, who are required to meet the data localisation requirements. This is challenging for small and medium-sized enterprises.[94] Most literature is heavily centred on the economic, and law and economics, understandings of the costs and implications of regulation of data. For instance, there is a concern that where the data relates to the provision of services, data flow restrictions can also undermine the value of WTO members' GATS services commitments.[95] As a result, it is sometimes stated that countries pushing for data localisation are 'hotbeds' of cyber crimes.[96] Governments across the world also increasingly cite foreign surveillance as an

[89] C Kuner, 'Data Nationalism and Its Discontents' (2015) *Emory Law Journal Online* 2089.

[90] Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 28–31; JL Goldsmith, 'Against Cyberanarchy' (1996) 65 *University of Chicago Law Review* 1199; DR Johnson and D Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367; D Post, 'Against "Against Cyberanarchy"' (2002) 17 *Berkeley Technology Law Review* 1365, 2092.

[91] Kuner, 'Data Nationalism and Its Discontents' (n 89).

[92] J Meltzer, 'Governing Digital Trade' (2019) 18 *World Trade Review* 23, 25.

[93] ibid.

[94] ibid 25.

[95] ibid, giving the example of where WTO members have scheduled a GATS commitment, they must also allow the data flow to deliver the service. Yet localisation measures can reduce access to, or raise the cost of transferring, such data.

[96] A Chander and UP Lê, 'Data Nationalism' (2015) 64 *Emory Law Journal* 677.

argument for preventing data from leaving their borders, allegedly into foreign hands.[97] Consequently, governments are increasingly said to localise data within their jurisdiction.[98] Data localisation can be understood as measures that encumber the transfer of data across jurisdictional borders.[99] It includes rules preventing information from being sent outside the country, rules requiring prior consent of the data subject before information is transmitted across national borders, rules requiring copies of information to be stored domestically, and even a tax on the export of data. Quite *how* the phenomenon plays out is another matter. Some contend that since much data sharing seems to be carried out between different intelligence services around the world, in the end data nationalism may only facilitate access by local intelligence services.[100] Others contend that data localisation measures are in fact likely to undermine security, privacy, economic development, and innovation where adopted.[101] Requiring local data storage arguably weakens, rather than strengthens, fundamental rights if it facilitates the access of intelligence services to data locally, who then share that data with other countries.[102] For instance, French intelligence services conducting widespread Internet surveillance in France and sharing the data collected with the US inevitably makes it unclear what the privacy benefits are of French data localisation.[103]

As countries increasingly apply their national law to cross-border activities on the Internet, will it become increasingly necessary to 'tag' or otherwise mark data to indicate the country whose law is processing it? This is where the EU has a different 'story' to tell. The landmark decision of the CJEU in *Schrems II* is said to mark a key shift towards data localisation in Europe and less openness, evinced through technology surveillance.[104] In either case, market pressures will contribute to the current increase of data localisation measures, as much as the rise of firewalls, yet redress issues will remain.[105] For instance, a number of US Internet

[97] ibid 680.

[98] M Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51(56) *University of California Davis Law Review* 65, 70; Chander and Lê, 'Data Nationalism' (n 96).

[99] Chander and Lê, 'Data Nationalism' (n 96).

[100] Kuner, 'Data Nationalism and Its Discontents' (n 89).

[101] Chander and Lê, 'Data Nationalism' (n 96) 682, reviewing measures in Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Kazakhstan, Malaysia, Nigeria, Russia, South Korea, Sweden, Taiwan, Thailand, and Vietnam, as well as the EU and a handful of other countries ('an astonishing array of countries …').

[102] C Kuner, 'Requiring Local Storage of Internet Data Will Not Protect Privacy' (*OUP Blog*, 6 December 2013) https://blog.oup.com/2013/12/data-security-privacy-storage-law/ accessed 24 February 2022; Kuner, *Transborder Data Flows and Data Privacy Law* (n 56).

[103] ibid.

[104] *Schrems II* (n 38); European Council, 'Special meeting of the European Council (1 and 2 October2020) – Conclusions' EUCO 13/20 (2020): '… to be digitally sovereign, the EU must build a truly digital single market. Define its own rules, to make autonomous technological choices. At international level, the EU will leverage its tools and regulatory powers to help shape global rules and standards …'.

[105] C Kuner, 'Data Nationalism and Its Discontents' (n 89), 2094; K Propp and P Swire, 'After *Schrems II*: A Proposal to Meet the Individual Redress Challenge' (*Lawfare Blog*, 13 August 2020), www.lawfareblog.com/after-schrems-ii-proposal-meet-individual-redress-challenge accessed 22 February 2022.

companies have set up local data processing centres as a way to deal with strict European standards, which means that market pressures dictate location. They also indirectly then enhance the EU's own institutionalisation of data notably, as to capacity, reach, authority and regulatory capabilities. It might be contended that similar issues exist as to so many other regimes, particularly strict and/or authoritarian regimes, to the effect that those jurisdictions also seek to institutionalise data. Such a claim is not denied; on the contrary, institutionalisation of data unquestionably constitutes a growing phenomenon.

These issues matter because barriers to data flows impinge upon trade and the capacity of a data-innovative economy to succeed. In recent years, many PTAs have started to include provisions on data localisation, either banning or limiting requirements on the location or use of data. An important difference with the data flows provisions is that almost all data location provisions found in trade agreements are of a binding nature.[106] Yet whether data localisation is actually harmful to the institutional structures of trade is a much larger intellectual question. Arguably, most analysis is heavily economically-oriented and wedded to modelling of barriers to trade that take little cognisance of rights and obligations. Is it correct to argue that those criticising the harmful effects of data localisation adopt a weak framework of fundamental rights protections? Can an open and free internet be achieved in the absence of a global pact on the subject matter? What about its intersection in all contemporary trade agreements? It can be argued that data localisation threatens Big Data by limiting data aggregation by country, increasing costs and adding complexity to the collection and maintenance of data. Data localisation requirements can reduce the size of potential data sets, eroding the informational value that can be gained by cross-jurisdictional studies.[107] It is likely to have quite a pernicious effect on cloud computing, innovation and data agility. In addition to digital services taxes, the Digital Markets Act (DMA) and the DSA, combined with data localisation measures, could cumulatively amount to a litany of measures to develop a de facto and de jure European firewall.[108] As a result, it is consistently argued that EU digital protectionism is stifling and hampers trade and diplomatic ties.[109]

The EU rejects, in principle, the assumption of an obligation to allow cross-border data flows.[110] Instead, it argues for a form of data localisation, outlawing

[106] M Burri and R Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187, 214.

[107] Chander and Lê, 'Data Nationalism' (n 96) 729.

[108] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final.

[109] C Barshefsky, 'EU Digital Protectionism Risks Damaging Ties with the US' (*Financial Times*, 2 August 2020), www.ft.com/content/9edea4f5-5f34-4e17-89cd-f9b9ba698103 accessed 24 February 2022 (former USTR).

[110] See K Propp, 'Data Flows across the Channel: The Emerging UK-EU Digital Trade Relationship' (*Atlantic Council*, 3 June 2020), www.atlanticcouncil.org/blogs/new-atlanticist/data-flows-across-the-channel-the-emerging-uk-eu-digital-trade-relationship/ accessed 24 February 2022.

rules that require a company to locate its computing facilities or network in the territory of the other party or that require data to be stored or processed there. The EU also advocates giving each party an absolute right to maintain any data privacy safeguards it deems appropriate, with no objective trade disciplines of the nature proposed by others in trade negotiations, such as the UK. The EU thus faces manifold criticisms of the *Schrems II* ruling, for the emphasis that it places upon data localisation directly or indirectly and the manner in which it appears to champion digital sovereignty.[111] Some suggest that the *Schrems II* decision is unworkable for the EU if it wishes to be a global actor.[112] While *Schrems II* is discussed in greater detail in Chapter 4, it is difficult to disagree with the thrust of how Chander depicts its legacy:

> The end result of [...] *Schrems* II is to reduce the available channels for transferring personal information from the [EU] to the [US]: two of the principal mechanisms for transferring personal data to the United States have either been repudiated outright or made unstable. The CJEU struck down the EU-US Privacy Shield, an agreement that more than 5,300 companies (both European and American) use to transfer data across the Atlantic. And while the CJEU upheld the validity of Standard Contractual Clauses (SCCs) for transferring data outside the EU, it conditioned that transfer on a determination by the transferring parties that the transfer would not risk unwarranted surveillance by the US government. While the putative defendant in the case was Facebook, it was the U.S. government that was on trial.[113]

The CJEU suggested using supplementary measures to protect data under the SCCs but did not explain what these measures could be, and in effect SCCs became mini-adequacy decisions.[114] 'Soft' data localisation is thus the likely result there.[115] However, keeping the information in the EU does not insulate the data from the surveillance of the EU Member States' own intelligence services and there has been a wealth of recent case law to this effect, putting contours on their actions and scope. There is a further argument to the effect that even the EU itself does not really know what EU data localisation looks like or means in the post-*Schrems II* world. Ultimately, the Internet itself appears to be likely to be further

[111] *Schrems II* (n 38); A Chander, 'Is Data Localization a Solution for Schrems II?' (2020) 23 *Journal of International Economic Law* 771.

[112] Propp and Swire, 'After Schrems II: A Proposal to Meet the Individual Redress Challenge' (n 105); C Kuner, 'The Schrems II Judgment of the Court of Justice and the Future of Data Transfer Regulation' (*European Law Blog*, 17 July 2020), https://europeanlawblog.eu/2020/07/17/the-schrems-ii-judgment-of-the-court-of-justice-and-the-future-of-data-transfer-regulation/ accessed 24 February 2022; M Rotenberg, '*Schrems II*, from Snowden to China: Toward a New Alignment on Transatlantic Data Protection' (2020) 26 *European Law Journal* 141.

[113] Chander, 'Is Data Localization a Solution for Schrems II?' (n 111) 774.

[114] Kuner, 'The Schrems II judgment of the Court of Justice and the future of data transfer regulation' (n 112).

[115] Case C-623/17, *Privacy International*, EU:C:2020:790; Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, EU:C:2020:791. See Chander, 'Is Data Localization a Solution for Schrems II?' (n 111).

split or divided between regulatory regimes, beyond that which the EU GDPR has initiated, from the Great Firewall of China to the West of Europe, a gigantic span of regulation.[116] The 'larger view' of data localisation is that it entrenches the protectionism allegations that the EU faces post-Brexit, as the European Council Conclusions of October 2020 unambiguously state: to be digitally sovereign, the EU must develop its own generic idea of the digital sphere that it inhabits.[117] This must entail that it defines its own rules to make autonomous technological choices. At the international level, the EU will leverage its tools and regulatory powers to help shape global rules and standards. Moreover, it is worth making the point that trade agreements follow a complex logic for these debates, ie that these issues play out in many forums beyond data flow agreements. For example, in one of the EU's most advanced FTAs on digital trade, the EU-Japan EPA, the requesting of source code is prohibited, while the location of computing facilities is not covered. Some key elements of this digital trade chapter relate to soft law obligations.[118]

Notably, the EU introduced a significant Regulation in 2018, when it sought to ban data localisation restrictions in order to ensure the free flow of data.[119] Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union was adopted as part of the Single Market for data storage and processing services, such as cloud computing. The Regulation was adopted with the intention of ensuring that the freedom to choose a data service provider anywhere in Europe would lead to more innovative data-driven services and more competitive prices for businesses, consumers and public administrations. Although on its face the Regulation intended to permit data to flow freely, allowing companies and public administrations to store and process non-personal data wherever they choose in the EU, important constraints on data within the territory of Europe are imposed. The Regulation removes any restrictions imposed by Member States' public authorities on the geographical location for storing or processing non-personal data, unless such restrictions are justified on grounds of public security. The Regulation defines non-personal data to include the rapidly expanding Internet of Things, artificial intelligence and machine learning. Whether it will have a more significant impact on the understanding of localisation remains to be seen. The EU's complex position on data localisation is developed further in Chapter 2 on digital trade.

Data localisation links also to the place of digital sovereignty.

[116] eg: EU users of US websites found themselves blacklisted from many US sites post-GDPR introduction or have to accept a site's user values when accessing a site: 'European readers still blocked from some US news sites' (*BBC News*, 26 June 2018), www.bbc.co.uk/news/technology-44614885 accessed 24 February 2022.

[117] European Council, 'Special Meeting of the European Council (1 and 2 October 2020) – Conclusions' (n 104).

[118] See S Hamanaka, 'The future impact of Trans-Pacific Partnership's rule-making achievements: The case study of e-commerce' (2019) 42 *World Economy* 552.

[119] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303/59.

VI. The EU, the Emerging Digital Sovereign

The EU has increasingly begun to advocate a message of tech sovereignty as its future. The evolution of this concept is far from clear-cut. It appears to have a long pedigree, though its association with the era of the Trump presidency and increasingly challenging global engagement seems beyond doubt. For the optimistic, it is a natural evolution of the so-called Brussels Effect.[120] Initially, EU digital sovereignty was cast in the era of the Trump administration, generating a Sino-US tech war, with little development of multilateralism or any meaningful WTO agenda on digital trade, and the increased dominance of China in tech wars.[121] It advocated developing the capability for the EU to make its own choices on its own values and own rules, predicated on an emerging regime of institutionalisation of compliance, enforcement and governance.[122] It also aligned with the development of a new generation of the regulation of internet controls to keep information from going out of a country rather than stopping it from entering the sovereign state space *qua* informational sovereignty. Still, it appears as a new EU lexicon in recent times.[123] The European Council in late 2020 advocated technological sovereignty as follows:

> The Covid-19 pandemic has further underlined the need to accelerate the digital transition in Europe. Seizing the opportunities of this transition is crucial to strengthening our economic base, ensuring our technological sovereignty, reinforcing our global competitiveness, facilitating the green transition, creating jobs and improving the lives of citizens. Building a truly digital Single Market will provide a home-based framework allowing European companies to grow and scale up.[124]

The definitional breadth of digital sovereignty in this is vast, and is increasingly understood in EU official documents and by EU Member State actors[125] and institutions[126] to warrant a holistic formulation of regulatory capture of the digital

[120] T Christakis, '"European Digital Sovereignty": Successfully Navigating Between the "Brussels Effect" and Europe's Quest for Strategic Autonomy' (2020) Multidisciplinary Institute on Artificial Intelligence/ Grenoble Alpes Data Institute, https://ssrn.com/abstract=3748098 accessed 24 February 2022.

[121] Although it has older origins: V Reding, 'Digital Sovereignty: Europe at a Crossroads' (*EIB Institute*, 2016), https://institute.eib.org/wp-content/uploads/2016/01/Digital-Sovereignty-Europe-at-a-Crossroads.pdf accessed 24 February 2022. See P Grüll, '"Geopolitical" Europe Aims to Extend its Digital Sovereignty from China' (*Euractive*, 9 September 2020), www.euractiv.com/section/digital/news/geopolitical-europe-aims-to-extend-its-digital-sovereignty-versus-china/ accessed 24 February 2022.

[122] European Commission, 'Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future' (19 February 2020).

[123] Kuner, 'Data Nationalism and Its Discontents' (n 89).

[124] European Council, 'Special meeting of the European Council (1 and 2 October 2020) – Conclusions' (n 104).

[125] eg Opinion of the Economic, Social and Environmental Council (France), 'Towards a European Digital Sovereignty Policy' (*ESEC*, 13 March 2019), www.lecese.fr/sites/default/files/travaux_multilingue/2019_07_souverainete_europeenne_numerique_GB_reduit.pdf accessed 24 February 2022.

[126] European Parliament, 'Digital Sovereignty for Europe' (2020) EPRS Ideas Paper Briefing, www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf accessed 24 February 2022. See European Parliament resolution on security threats connected with the rising Chinese technological presence in the EU and possible action on the EU level to reduce them

in an unprecedented way, albeit mostly referring to Europe's ability to act independently in the digital world.[127] There are those who criticise European digital sovereignty as a circular oxymoron, confusing human-centered autonomy – each individual citizen is personally sovereign over their data, interactions with AI, etc – with a more Westphalian understanding of sovereignty: each state has an undisputed power monopoly within its border.[128] It is also criticised for the conflicting EU bureaucracies involved in its implementation, where competition policy, one of the EU's most powerful competences and areas of strength, still pales in contrast to the gigantic regulatory tasks involved in non-competition areas. We might say that all digital matters in theory may ostensibly appear to be incapable of being adequately institutionalised despite their need for it. A seemingly conflictual agenda of regulating digital platforms, net neutrality and an EU ecosystem of values appears to constitute the 'surface' meaning thereof.[129] Ultimately, however, a significant amount of institutionalisation of digital sovereignty appears at its heart, which renders it such a rich Europeanised construct.

For many, the defensiveness at the heart of the EU digital sovereignty agenda is striking. Some understand its rhetoric to be predominantly based in the need for robust cyber sanctions and to flight information wars with Russia and China in the future.[130] It can be seen as a means to support EU tech champions. Mostly, it is understood as a defensive reaction to an increasingly hostile environment of the US-China tech wars, at least during the Trump administration, and an era of a lack of multilateralism.[131] Sovereignty is an increasingly dated and provocative subject, castigated for its lack of relevance in contemporary sovereignty in

(2019), 2019/2575(RSP) – 12/03/2019, https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1577382&t=d&l=en accessed 24 February 2022.

[127] European Parliament, 'Digital Sovereignty for Europe' (n 126); *cf* European Commission, 'Europe: The Keys to Sovereignty' (News) (11 September 2020), https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/europe-keys-sovereignty_en accessed 24 February 2022; FG Burwell and K Propp, 'The European Union and the Search for Digital Sovereignty: Building "Fortress Europe" or Preparing for a New World?' (*Atlantic Council*, June 2020), www.atlanticcouncil.org/wp-content/uploads/2020/06/The-European-Union-and-the-Search-for-Digital-Sovereignty-Building-Fortress-Europe-or-Preparing-for-a-New-World.pdf accessed 24 February 2022.

[128] See T Barker, 'Europe Can't Win the Tech War It Just Started' (*Foreign Policy*, 16 January 2020), https://foreignpolicy.com/2020/01/16/europe-technology-sovereignty-von-der-leyen/ accessed 24 February 2022.

[129] K Komaitis, 'Europe's Pursuit of Digital Sovereignty Could Affect the Future of the Internet' (*TechEU*, 7 September 2020), https://tech.eu/features/32780/europe-digital-sovereignty/ accessed 24 February 2022.

[130] V Manancourt and M Heikkilä, 'EU Eyes Tighter Grip on Data in "Tech Sovereignty" Push' (*Politico*, 29 October 2020), www.politico.eu/article/in-small-steps-europe-looks-to-tighten-grip-on-data/ accessed 24 February 2022.

[131] C Hobbs (ed), *Europe's Digital Sovereignty: From Rulemaker to Superpower in the Age of US-China Rivalry* (Essay Collection, European Council of Foreign Affairs 2020), https://ecfr.eu/wp-content/uploads/europe_digital_sovereignty_rulemaker_superpower_age_us_china_rivalry.pdf accessed 24 February 2022.

an age of globalisation and long the subject of many contentious applications to the EU.[132] Digital sovereignty is no less controversial for the EU and is innately a concept about conflict and contestation. EU digital sovereignty above all is conceived as a language of strife, might and fight – through institutions.[133] This is arguably as close as the EU gets to a shared construction of digital sovereignty with the US and China in particular. At heart, digital sovereignty links closely to ideas of digital protectionism, but in itself this is quite a fluid concept and the 'free' nature of 'free flows' is not a straightforward idea.[134] Putting down demarcations of territory in the digital leads to convoluted forms of globalisation, as Chander reminds us eloquently in the electronic Silk Road.[135] As Floridi states, '[t]he fight for digital sovereignty is an epochal struggle not only of all against all, but also of anyone allied with anyone, with variable alliances changing according to interests and opportunities'.[136] It is a clash where tech companies may try to trick or bypass states and their legislation, fight each other or become embroiled in the questions of home soil and transnationalism, disputes that Facebook, Google, Microsoft and Twitter have all been party to.[137] It cannot be forgotten that the EU has adopted sanctions against 35 countries and four thematic sanctions regimes regarding chemical weapons and terrorism and most recently cyber sanctions and human rights and has, along with the US, one of the world's largest sanction regimes.[138] It begs the question about the definition of sovereignty emerging. However, the 'holisticness' of digital sovereignty as a concept is arguably highly complex to evaluate. For instance, the robustness of some of the most institutionalised areas of EU policy, eg competition law, are increasingly under development

[132] eg D Herzog, *RIP Sovereignty* (Yale University Press, 2020); R Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 42 *Journal of Common Market Studies* 743; see SD Krasner, *Sovereignty. Organised Hypocrisy* (Princeton University Press, 1999); S Sassen, *Losing Control? Sovereignty in the Age of Globalization* (Columbia University Press, 1996); J Cohen, *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012); N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003).

[133] J Borrell, 'Europe Must Learn Quickly to Speak the Language of Power' (*EJIL:Talk!*, 25 October 2020), www.ejiltalk.org/europe-must-learn-quickly-to-speak-the-language-of-power-part-i/ accessed 24 February 2022.

[134] S Aaronson, 'What Are We Talking about When We Talk about Digital Protectionism?' (2019) 18(4) *World Trade Review* 541.

[135] A Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press 2013), Ch 8 in particular.

[136] L Floridi, 'The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU' (2020) 33 *Philosophy and Technology* 369.

[137] 'Apple and Facebook Trade Accusations over Data Privacy' (*Financial Times*, 20 November 2020), www.ft.com/content/54c54efb-7c80-4468-bf8f-c646e2bbe07f accessed 24 February 2022.

[138] C Portela, 'The Spread of Horizontal Sanctions' (*CEPS*, 7 March 2019), www.ceps.eu/the-spread-of-horizontal-sanctions/ accessed 24 February 2022; European Parliamentary Research Service, 'EU Sanctions: A Key Foreign and Security Policy Instrument' (2018) PE 621.870; C Eckes, 'The Law and Practice of EU Sanctions' in S Blockmans and P Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar, 2019); EU Sanctions Map (2019): https://www.sanctionsmap.eu accessed 24 February 2022; as to Russian sanctions see https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/.

with respect to the regulation of Big Tech, eg the DMA or new competition tools for digital markets. Equally, the institutionalisation of data flows and data governance through far-reaching new EU instruments is at the core of the proposed Data Governance Act.[139] To a degree, the EU here appears to give itself carte blanche with regard to at least one the three most problematic concepts of global governance – sovereignty, territory and jurisdiction – by evolving such a defensive and offensive conceptual tool as digital sovereignty, and giving its own efforts at extraterritoriality, for example, more legitimacy and 'respectability'.[140]

Digital sovereignty self-evidently thus gives identity and unity to EU data regulation. Arguably, however, it is a hallmark of a new era of trade and data regulation on account of its defensiveness and even its protectionism. It even appears outmoded and uncharacteristic to some extent as a development of the EU as a global actor. Digital sovereignty also has a complex relationship with strategic autonomy.[141] The infrastructure dimension of digital sovereignty thus appears

[139] The DGA is intended to create a standardised framework of trusted tools and techniques to encourage data reuse by setting 'secure and privacy-compliant conditions' for sharing data: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European data governance' (Data Governance Act) COM (2020) 767 final. Concerns have been expressed as to the EU Data Governance Act, on localisation and its capacity to manage the distinction between personal and non-personal data: see EDPB-EDPS, 'Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act)' (2021), https://edpb.europa.eu/system/files/2021-03/edpb-edps_joint_opinion_dga_en.pdf accessed 24 February 2022. See also EDPB, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' (2020), https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf accessed 24 February 2022. On the understandings of market power relative to architectural power through its institutional design see C Doctorow and C Schmon, 'The EU's Digital Markets Act: There is a Lot to Like, but Room for Improvement' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/eus-digital-markets-act-there-lot-room-improvement accessed 24 February 2022.

[140] See E Fahey, *Introduction to Law and Global Governance* (Edward Elgar, 2018) 91. See H Buxbaum 'Territory, Territoriality and the Resolution of Jurisdictional Conflict' (2009) 57(2) *American Journal of Comparative Law* 631.

[141] See eg European Parliament, 'Legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Digital Europe programme for the period 2021–2027 (COM(2018)0434 – C8-0256/2018 – 2018/0227(COD))' (2019) P8_TA(2019)0403; European External Action Service, 'Why European strategic autonomy matters' (3 December 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/89865/why-european-strategic-autonomy-matters_en accessed 24 February 2022; European Council, 'Digital sovereignty is central to European strategic autonomy – Speech by President Charles Michel at "Masters of Digital 2021" online event' (3 February 2021), www.consilium.europa.eu/en/press/press-releases/2021/02/03/speech-by-president-charles-michel-at-the-digitaleurope-masters-of-digital-online-event/ accessed 24 February 2022; B Lippert et al (eds), 'European Strategic Autonomy: Actors, Issues, Conflicts of Interests' (2019) SWP Research Paper 2019/RP 04; G Grevi, 'Strategic Autonomy for European Choices: The Key to Europe's Shaping Power' (2019) European Policy Centre Discussion Paper; S Anghel et al, 'On the Path to "Strategic Autonomy": The EU in an Evolving Geopolitical Environment' (2020) European Parliamentary Research Service, PE 652.096; '10 Point-Manifesto Towards European Digital Strategic Autonomy' (*Eurosmart*, 2019), https://www.eurosmart.com/towards-european-digital-strategic-autonomy-digital-sovereignty/ accessed 24 February 2022; P Tamma, 'Europe wants "strategic autonomy" – it just has to decide what that means' (*Politico*, 15 October 2020), www.politico.eu/article/europe-trade-wants-strategic-autonomy-decide-what-means/ accessed 24 February 2022.

all the more ambiguous post-*Schrems II*. Data localisation generated through the 'negative' institutionalisation of the CJEU is not easy to regulate, to govern or to implement. It ultimately appears predicated on certain barriers and obstacles and the hindering of the free flow of data, somehow in the public interest, through complex hybrid public regulation of private actors who are increasingly public and increasingly transnational.[142]

VII. Global Capture of Big Tech? European Data Spaces and the DMA/DSA

A European Strategy for Data was published in February 2020, designed to develop a Single Market in Data by 2025 and a Common European Data Space. It focused on tackling, inter alia, fragmentation between Member States in nine areas, ranging from industrial manufacturing to health, financial, energy, and agricultural data,[143] and was accompanied by a significant White Paper on Artificial Intelligence.[144] This construction of regulatory spaces takes institutionalisation of data to a new level for the EU. It seeks to design a space relative to economic power on the basis of a single market therein, enabling the EU to obtain by 2030 a share of the data economy. However, it is notably predicated on voluntary cooperation by market participants, entailing a requirement to join the data space, and to assess and certify compliance. This 'law-light' 'institution-light' formulation was rolled out with a sharply contrasting vision of the reach of EU law. On 29 January 2020, the European Commission's Work Programme 2020 was published. Under the second priority – 'A Europe fit for the digital age' – the Commission proposed a new DSA and a new DMA in 2020 in order to reinforce the single market for digital services and help provide smaller businesses with the legal clarity and level playing field they need.[145] It develops complex means to understand gatekeepers on a company level. Arguably, as regulatory interventions (ongoing through the legislative process at the time of writing), they are mostly characterised by their restraint. The EU has sought through two key Acts – the DSA and the DMA – and to a degree through a third, the Digital Governance Act, to build on the political successes of the GDPR and the political capital it has unleashed against Big Tech but also by departing from the GDPR philosophy. The Acts constitute an architecture

[142] Burwell and Propp (n 127).

[143] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A European Strategy for Data"' COM (2020) 66 final.

[144] European Commission, 'White Paper "On Artificial Intelligence – A European Approach to Excellence and Trust"' COM (2020) 65 final.

[145] European Commission, 'Commission Work Programme: A Union That Strives for More' COM (2020) 37 final.

of horizontal regulation applying to all processes involving personal information, whether they occur online or offline or by private, public or commercial actors.[146] They are controversial pieces of legislation for many reasons, principally because of their relationship to competition law and their effects on innovation through a regulatory infrastructure with unprecedented reach.

The EU's introduction of the DMA has seen it attempt to radically evolve the regulation of Big Tech. It has drawn the EU into much controversy over the reach of conventional competition law powers and regulatory powers to capture ex ante actions.[147] Some commentators point out that for Article 114 TFEU to be a valid legal basis for the DMA, it necessitated important adaptations to ensure harmonisation of national laws and respect for the principle of proportionality and for companies' fundamental rights, and to reduce the Commission's margin for discretion.[148] Others warn that the DMA would probably have a chilling effect on research, development and innovation. The framework that is proposed by the EU is of much significance for its ambit. It attempts in Article 3 to define gatekeepers as entities with a significant impact on the EU internal market that operate one or more important gateways to customers and enjoy an entrenched and durable position in their operations. The term is intended to apply to a particular dominant actor where economic significance, scope or size provide grounds for concern about control over the economy. The DMA also sets certain quantitative criteria that establish a presumption for gatekeeper status. It has ultimately started to ignite in shifts in regulation globally through its selection of subjects and objects. It proposes to set narrowly defined objective criteria by which a large online platform can qualify as a so-called gatekeeper, with the aim of tackling large systemic online platforms and institutionalising them as subjects and objects of EU law in a manner that has not previously been achievable. The draft DMA is based upon the premise that competition law principles would not limit administrative action but this raises questions as to the robustness of its institutional design.[149] It is stated that it is unusual for the Commission to build a regulatory regime based on autonomous legal concepts wholly from scratch. Can gatekeepers be constrained as providers of core platform services in this legislation? There is little opposition from within the EU and among its law-makers to the possibility of a European infrastructure that can engage with the scale of regulating Big Tech.

[146] H Lee-Makiyama, 'On New Regulation of Europe's Digital Markets' (*Wilson Center*, 5 April 2021), www.wilsoncenter.org/article/new-regulation-europes-digital-markets accessed 24 February 2022.

[147] European Commission, 'Proposal for Digital Markets Act' (n 19).

[148] See A Lamadrid de Pablo and N Bayón Fernández, 'Why The Proposed DMA Might be Illegal under Article 114 TFEU, and How To Fix It' (2021), https://antitrustlair.files.wordpress.com/2021/04/why-the-proposed-dma-might-be-illegal-under-article-114-tfeu-and-how-to-fix-it-3.pdf accessed 24 February 2022.

[149] See P Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) SSRN Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276 accessed 24 February 2022.

For instance, the European Parliament appears to agree with the Commission that the proposal needs to include ex ante rules on systemic operators with a gatekeeper role pursuant to the internal market, with the potential to open up markets to new entrants.[150] The DMA has faced many accusations as to the EU's capacity to limit innovation here or whether the Act is a 'game changer' in addressing digital market distortions, including anti-market practices.[151] Nonetheless, from a regulatory perspective, the EU's actions in the digital space are undoubtedly primarily defensive, as is evident from the framing of digital sovereignty. Given the lack of success of competition law or antitrust in engaging with tech platforms, new formulations of engagement form the core of the DMA.

The DSA provides for a so-called horizontal framework for transparency, accountability and regulatory oversight of the EU online space, not to replace but to complement the E-Commerce Directive and other legislation, eg Platform to Business regulation. It has four specifically key sets of rules on intermediary services, hosting services, online platform services and very large online platform services. It is said to be a horizontal instrument because it puts in place a framework of layered responsibilities targeted at different types of intermediary services. All online intermediaries offering their services in the EU would have to comply with the new rules, including those established outside of the EU. However, the obligations are said to be asymmetric because they would create a range of harmonised EU-wide symmetric obligations. The extent to which such terminology is over-stated or even facetious remains to be seen. On its face, it places a range of obligations on the providers of intermediary services and on online platforms and hosting service providers. The DSA is similarly poised to legislate in a far-reaching way on various issues relating to technology platforms, including competition, data sharing and content moderation. What is striking about the proposed institutionalisation of the DSA is its engagement with 33,000 stakeholders and the multiplicity of actors therein.[152]

The DSA was proposed by the Commission in the form of a regulation on a single market on digital services on the basis of Article 114 TFEU to prevent

[150] See European Parliament, 'Digital Markets Act' (2021) European Parliamentary Research Service PE 662.641, www.europarl.europa.eu/RegData/etudes/BRIE/2021/662641/EPRS_BRI(2021)662641_EN.pdf accessed 24 February 2022 and European Commission, European Commission, Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, 'Shaping Europe's digital future' COM (2020) 67 final. The European Parliament here cites the Commission statement: 'Among the key actions envisaged in the communication was a digital services act package to "further explore … ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants"'.

[151] On the eve of the first EU-US Summit in 2021, the Biden administration even argued that the DMA was anti-American: J Espinoza and J Politi, 'US Warns EU against Anti-American Tech Policy' *Financial Times* (15 June 2021), www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259 accessed 24 February 2022.

[152] Commission Staff Working Document, 'Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' SWD(2020) 348 final. 1

divergences from hampering the free provision of cross-border digital services and to guarantee the uniform protection of rights and uniform obligations for business and consumers across the internal market.[153] The DSA has a complex relationship with the DMA and is said to both bolster it and synergise with it. Its key legal link appears striking, with its legal base being rooted in Article 114 TFEU. It is important to state that the EU has a longstanding history of the broadest use of Article 114 TFEU and an extensive CJEU jurisprudence exists on the parameters of its use, which is largely benevolent. There was a significant cross-institutional alignment of the EU institutions to regulate online marketplaces, eg Amazon, eBay and Alibaba, seeking more requirements for e-commerce platforms. Whatever the outcomes of these law-making negotiations, the depth of the regulatory capture is far-reaching and explicit. The EU is repeatedly criticised for its negative regulatory vision of 'reining in' Big Tech rather than creating a positive one to foster innovation.[154] Herein lies the dilemma: the EU has immense capacity to generate institutionalisation, but whether that is what will actually be generated here remains to be seen, particularly because of the autonomy of actors emerging and the likely stabilisation of the projects. It is hard to better the words of Schaake: '[the] EU is somewhat coasting on its reputation for introducing measures such as GDPR. Instead, it needs to embrace a positive vision and plans to grow the European tech market … in addition to regulatory measures'.[155]

It is asserted that the DSA will turn online platforms into judge, jury and executioner when it comes to removing online content, in line with other copyright law developments. It is also said to give vast powers to the European Commission and national governments to suppress opposing voices, particularly arising from suggestions that platforms be ordered to make legality assessments of content in the absence of public scrutiny within 24 hours if the content can, for example, harm public policy.[156] The DSA aims to introduce more transparency and accountability with regard to social media platforms and online speech. The DSA is not per se about content but rather the processes to ensure that digital services work to support decisions made in democracies. The institutional and procedural innovations of the DSA are manifold. It sets up mechanisms for users to complain or to seek redress if their posts or profiles are removed. The DSA also requires general risk assessments, whereby tech companies will need to ask themselves whether their platforms will invite threats to democracy and how they can mitigate those risks. The DSA

[153] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final.

[154] Schaake (n 19).

[155] ibid.

[156] European Parliament Committee on the Internal Market and Consumer Protection, 'Draft Report with recommendations to the Commission on Digital Services Act: Improving the functioning of the Single Market' (2020) 2020/2018(INL); See also J Penfrat, 'DSA should promote open and fair digital environment, not undermine the rule of law' (*EDRi*, 2020), https://edri.org/our-work/dsa-must-promote-open-and-fair-digital-environment-not-undermine-the-rule-of-law/ accessed 24 February 2022.

is a main centrepiece of EU law-making, with much focus on disinformation.[157] It is significant that the DSA is accompanied by a DMA designed to address the concentration of power in digital markets, rooted in the internal market legal base of Article 114 TFEU.[158] Notably, other forms of EU disinformation efforts have been undertaken through soft law, through self-regulatory Codes of Practice on Disinformation in force since October 2018 yet with limited success in the face of rising tides of disinformation becoming regularised in social media. It was allegedly 'strengthened' as a co-regulatory instrument along with the DSA in 2021, yet much remains to be seen as to the capacity of the EU concretely to evolve its content.[159]

The DSA and DMA follow atypical EU regulatory models of infrastructure, actors, agencies and regulatory structures, based upon robust intuitional design because they are single-market related. Their capacity to have external relations powers de facto or de jure remains to be seen. Nonetheless, the institutionalisation of data appears significantly 'ratcheted up' by these two core planks of the EU's digital strategy. The use here of the internal market is significant in bolstering the breadth of the Acts. Yet it also constrains them and shows an uneasy use of the intersection of internal market and competition law.

VIII. The EU's Emerging Architectural Infrastructure of AI: Global Lead on Regulatory Capture

The EU has introduced the first all-encompassing AI regulation in the world, immediately welcomed by the US and a host of civil society organisations.[160] The EU has

[157] B Martins dos Santos and D Morar, 'Four lessons for U.S. legislators from the EU Digital Services Act' (*Brookings*, 6 January 2021), www.brookings.edu/blog/techtank/2021/01/06/four-lessons-for-u-s-legislators-from-the-eu-digital-services-act/ accessed 24 February 2022; C de Froment, 'Digital Services Act: New Forms of Work' (*Institut Montaigne*, 15 September 2020), www.institutmontaigne.org/en/blog/digital-services-act-new-forms-work accessed 24 February 2022; C Schmon and K Gullo, 'European Commission's Proposed Digital Services Act Got Several Things Right, but Improvements Are Necessary to Put Users in Control' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/european-commissions-proposed-regulations-require-platforms-let-users-appeal accessed 24 February 2022; G Babinet et al, 'Digital Services Act: Moderating Content and Protecting Minors' (*Institut Montaigne*, 18 September 2020), www.institutmontaigne.org/en/blog/digital-services-act-moderating-content-and-protecting-minors accessed 24 February 2022.

[158] European Parliament, 'Digital Markets Act' (n 150); European Parliament, 'Digital Services Act' (2021) European Parliamentary Research Service PE 689.357, www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI(2021)689357_EN.pdf accessed 24 February 2022.

[159] Code of Practice on Disinformation: https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation accessed 24 February 2022. The Code of Practice was signed by the online platforms Facebook, Google and Twitter, Mozilla, as well as by advertisers and parts of the advertising industry in October 2018, all of whom then later presented their roadmaps to implementation. Microsoft and Tiktok became signatories in 2019 and 2020.

[160] See European Commission, 'Communication: 'Shaping Europe's digital future' (n 150). See 'A Union that strives for more: My agenda for Europe – By candidate for President of the European Commission Ursula von der Leyen; Political Guidelines for the Next European Commission 2019–2024', 13, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf accessed 24 February 2022.

sought to frame AI using OECD terminology and definitions thereof as widely accepted as possible to encompass human-produced systems and to understand AI in similar terms to product safety, ie as a human product. The EU is attempting here to shift discussions beyond mere ethics to form binding rules – all-pervasive to society in all areas. The first legally binding law on AI would be no small global achievement. For the EU, institutionalising AI in this way amounts to an issue of power: regulating power to corporations over countries and people. The legislative process as to the EU's AI regulation can be described as a 'finding process', to ascertain the core thereof. During the law-making process of the GDPR, a significant amount of US lobbying sought to water down the proposals. Interestingly, the US has welcomed the EU's AI proposals, marking a significant shift from its reaction to the EU's GDPR legislation. The EU is understood in this law-making process to be following its values by putting structures, design and autonomous actors in place to support them. Under the EU's proposal, most AI systems will not be high risk (see draft titles IV and IX). One of the features of the legislation is the transparency obligations (pursuant to Article 52) to notify humans that they are interacting with an AI system. The EU has sought here to move from the ethics-probing challenges of many parties, including within the Commission and also in the Member States, to legal proposal, where a transition from talk and ethics to law is perceived as a gigantic leap. The EU's law fundamentally challenges the infamous Barlow discourse on the law-free nature of the Internet – which has now been consigned to history in the EU – and does so in Washington DC. The EU's efforts show that AI regulation is similarly neither law-free nor democracy-free. EU legislation subverts the claim that the Internet could be free from regulatory capture, 'Barlow-esque'.[161] The EU's process of law-making has also been fundamental in procuring a design of this nature, as participation is key for the EU in law-making, including extensive stakeholder engagement, considerable involvement of civil society and the far-reaching bottom-up development of proposals. In this regard, the AI regulation is far from merely a technical debate. Thus from the DMA, DSA to AI civil liability, the EU has sought to write a new *code civil* for the Internet and digital society through its institutionalisation. It emerges as a constitution for the technical which is trying to operationalise constitutional values – previously the preserve of specialists and ethicists. Institutionalisation here is an important value encapsulating the actions taking place. It thus challenges the complexity, opacity, unpredictability and autonomy of data, and addresses directly the many reasons to not regulate in the usual way, but rather to retain AI within the preserve of ethics – thus engaging directly with safety risks, fundamental rights risks, enforcement, legal certainty, mistrust and fragmentation. The definition and scope of the regulation is provided for in Article 6. It is defined as neutrally as possible, and provides in Annexe i a catalogue list of techniques and approaches that can be amended/proposed. It differentiates four risk groups in a pyramid: those permitted with no restrictions; those permitted with information obligations; those that are high risk

[161] Barlow (n 1).

eg recruitment, medical devices permitted subject to compliance with AI requirements and ex ante Conformity assessment; unacceptable risk eg social scoring which is prohibited. In so doing, it has adopted many principles of the internal market, eg as to product conformity assessments, and applied them to AI. It has thus sought to widen the reach of its most successful internal policy field, itself highly institutionalised.

IX. Conclusions

The EU has essentially developed an approach to data protection because it is widely understood to have had extra-territorial reach and effects, both de facto and de jure. The resulting architecture is a complex system of bodies at EU and national level who are charged with responsibility for the enforcement of the rules in the GDPR. The dense institutional design and autonomy of individual actors furthered by the GDPR continue to be core hallmarks of EU regulatory capture of data. The EU now has data transfer regimes and flows with third countries, which count as some of the largest in the world, featuring significant institutional dimensions. As has been outlined above, the EU's data adequacy system is ultimately both highly politicised and institutionalised: the Court of Justice has inserted itself into the adequacy process, institutionalising global data flows like no other process, in its extraordinary interventions in its landmark decisions in *Schrems I* and *II* relating to the EU-US Privacy Shield and previous Safe Harbour Agreement. The EU's data regimes vary in scale and complexity and most of all in institutional design. A turn to institutions and deeper forms of institutional oversight, accountability and legitimations is definitively 'European' and differs substantially from US and Asian models of looser accountability and oversight. The EU has the advantage of being the first mover, and also the first mover with the highest standards and some of the deepest institutionalisation to date, as well as ambitious extra-territorial reach to follow through on its internationalist ambitions in generating a global standard.

EU digital sovereignty has emerged as a strange lexicon, as a language of strife. As has been argued here and elsewhere, from the DMA, DSA to AI civil liability, the EU has evidently sought to write a new *code* for the Internet and digital society through its institutionalisation. This constitution for the technical emerges which tries to operationalise constitutional values through atypical institutional design and the rising autonomy of actors. The depth of the design, eg its agencification, and the success of the breadth of its regulatory capture, given its many subjects and objects, remains to be seen.[162]

[162] See G De Gregorio and O Pollicino, 'The European Constitutional Road to Address Platform Power' (*Verfassungsblog*, 31 August 2021) https://verfassungsblog.de/power-dsa-dma-03/ accessed 24 February 2022; see The Digital Constitutionalist Project: https://digi-con.org/ accessed 24 February 2022.

2

The EU as a Digital Trade Actor

I. Overview: Digital Trade – A Fragmented and De-institutionalised Landscape?

Across many disciplines and subject fields, digital trade and the digital economy are widely agreed to be key elements in the successful development of the future economy.[1] Companies and governments are encouraged to use the potential of data and to mobilise their resources appropriately so as to make the data-drive economy real. Digital trade is already one of the main driving forces behind sustained economic growth, because it helps countries to improve productivity, a key indicator for technological advancement and the chief source of future economic welfare.[2] However, the perils of reliance on data and Big Data with respect to the protection of privacy are also repeatedly highlighted.[3] While data and digital information may have joined 'oil, tanks and money' as the key currency of international affairs,[4] from a legal perspective the curious and complex place of data represents a challenge. However, the newly emerged framework of digital trade governance, despite increasing numbers of digital trade provisions in digital trade chapters, is increasingly fragmented, patchy and complex.[5] While there may be some regulatory convergence on certain objectives and principles, significant

[1] World Bank 'World Development Report 2021: Data For Better Lives', www.worldbank.org/en/publication/wdr2021 accessed 24 February 2022. In the transatlantic context, see generally D Hamilton and J Quinlan, US Chamber of Commerce, *The Transatlantic Economy 2021* (2021), www.amchameu.eu/sites/default/files/publications/files/transatlanticeconomy2021_fullreporthr.pdf accessed 24 February 2022.

[2] MF Ferracane et al, 'ECIPE Digital Trade Restrictiveness Survey Index' (ECIPE, 2018), https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf accessed 24 February 2022.

[3] M Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51(56) *University of California Davis Law Review* 65, 67; Council of Europe, 'Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data' (23 January 2017) T-PD(2017)01, https://rm.coe.int/16806ebe7a accessed 24 February 2022; Federal Trade Commission Staff Report, 'Internet of Things: Privacy and Security in a Connected World' (2015), www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf accessed 24 February 2022.

[4] H Farrell and A Newman, *Of Privacy and Power: The Transatlantic Struggle over Freedom and Security* (Princeton University Press, 2019) 173.

[5] M Burri and R Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187, 220.

differences remain with regard to the treatment of cross-border data flows, data localisation and personal data protection. Also, despite the growing importance of digital trade, little is known about its scale. New studies of digital trade restrictiveness globally are only recently beginning to emerge.[6] Reliable and internationally comparable statistics on digital trade that are coherent with national accounting frameworks are limited.[7] Any reasonable enquiry into the relationship between data and digital trade arguably needs also to be partly descriptive in order to attempt to map the field. With the exception of the framework developed jointly by the Organisation for Economic Co-operation and Development (OECD), World Trade Organisation (WTO) and International Monetary Fund (IMF), there have been few attempts to systematically define digital trade.[8] Perhaps unsurprisingly, there have also been few attempts to systematically map the content of digital trade, at least until recently.[9]

There is no global or legally agreed definition for either data or digital trade in an international trade agreement.[10] Data comprises a broad church of concepts and forms, from cybersecurity, intellectual property and transparency to frictionless

[6] There are several new databases on digital trade policy measures as provided by the Global Trade Alert, the OECD Digital Services Trade Restrictiveness Index and ECIPE's Digital Trade Estimates project and the Global Data Governance Mapping Project at the Digital Trade and Data Governance Hub. See respectively, Digital Trade Alert Website: www.globaltradealert.org/digital_policy; OECD Digital Services Trade Restrictiveness Index: https://stats.oecd.org/Index.aspx?DataSetCode=STRI_DIGITAL; Digital Trade Estimates, https://ecipe.org/dte/ and Datahub Global Data Governance Mapping Project: https://datagovhub.elliott.gwu.edu/, all accessed 24 February 2022.

[7] Cambridge Econometrics for UK Department of International Trade and Department of Digital, Culture, Media & Sport, 'Understanding and Measuring Cross-border Digital Trade' (14 May 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885174/Understanding-and-measuring-cross-border-digital-trade.pdf accessed 24 February 2022, who state that the OECD-WTO-IMF framework is a useful starting point for understanding and measuring the different components of digital trade. The OECD-WTO-IMF framework defines digital trade as trade that is 'digitally ordered' (synonymous to e-commerce) and/or 'digitally delivered' (services transactions that are delivered remotely through computer networks).

[8] OECD-WTO-IMF framework from the United Nations Conference on Trade and Development paper 'Information Economy Report 2017: Digitalization, Trade and Development' considers that there are broadly three levels of digital economy: (1) core digital IT/ICT sector: the ICT-producing sector comprising of both IT infrastructure and IT services; (2) narrow scope (digital economy): adds to the core definition with digital services (eg outsourced call centre services) and the platform economy (eg Facebook and Google); and (3) broad scope (digitalised economy): includes the use of various digital technologies for performing activities such as e-business, e-commerce, automation and artificial intelligence. The biggest challenges to measuring digital trade are said to relate to: transactions involving intermediaries; (free) cross-border data flows that involve no monetary transactions; imports of e-services (such as digital downloads, or streaming services) by households; de minimis trade; options to measure emergent innovations in the digital domain eg cloud computing, or crypto-assets). See United Nations Conference on Trade and Development, 'Information Economy Report 2017: Digitalization, Trade and Development' (2017), https://unctad.org/system/files/official-document/ier2017_en.pdf accessed 24 February 2022. See also J Lopez-Gonzalez and MA Jouanjean, 'Digital Trade: Developing a Framework for Analysis' (2017) OECD Trade Policy Papers No 205.

[9] See ibid. See also United States Trade Representative, 'Key Barriers to Digital Trade' (2017), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade accessed 27 February 2022.

[10] *cf* Datahub Global Data Governance Mapping Project (n 6).

movement of tech workers. Many activities, such as sharing information, regulation, laws and programs on data protection, domestic regimes for the protection of personal data, technical assistance in the form of exchange of information and experts, research and training activities, joint programmes, dialogues, consultations on data protection, etc, constitute activities involving cooperation relating to data.[11] It is a truism that every twenty-first century trade agreement wants a holistic and robust chapter on electronic commerce or digital trade – but rarely obtains it.[12] WTO law stands at an embarrassing juncture and is sorely in need of modernisation. Digital taxation remains outside of trade agreements but is a key peripheral area, affecting the scope and ambition of trade agreements in some instances. Free Trade Agreements (FTAs) are understood to have generated considerable rule fragmentation in the area of data and digital trade because of the overarching outdated state of WTO provisions on digital trade.[13] The era of the Internet and of the wholesale digitisation of Covid-19 society has given rise to an explosion of 'data localisation' measures, which involve data about a nation's citizens or residents being collected, processed, and/or stored in that country. Data localisation is a particularly significant flashpoint in the rule-making, explored further in this chapter. Thus, states around the world have taken to trade agreements to 'fill in the gaps' of the outdated WTO framework, discussed further below.[14] As a result, however, the framework that now regulates contemporary digital trade is understood to be extremely fragmented, from a legal point of view.[15] Ultimately, it is far removed from being an 'institutionalised' landscape in any shape or form.

It is also worth stating that no WTO member classified as a developing country by the United Nations or as a low-income country by the World Bank has agreed a Regional Trade Agreement (RTA) that contains an e-commerce chapter.[16] No WTO member in sub-Saharan Africa has ever agreed an RTA that contains an e-commerce chapter. Until very recently, even developed economies did not seek to include a chapter on e-commerce or digital trade.[17] However, the most developed global economies tend to have been most active in negotiating

[11] M Burri, 'Should There Be New Multilateral Rules for Digital Trade?' (2013) E15 Expert Group on Trade and Innovation 15–16.

[12] R Wolfe, 'Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP' (2019) 18(S1) *World Trade Review* 63, 63–64.

[13] Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3) 127.

[14] Burri and Polanco (n 5); H Gao, 'The Regulation of Digital Trade in the TPP: Trade Rules for the Digital Age' in J Chaisse et al (eds), *Paradigm Shift in International Economic Law Rule-Making* (Springer, 2017) 345.

[15] Burri and Polanco (n 5) 220.

[16] M Wu, 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (2017) RTA Exchange International Centre for Trade and Sustainable Development and Inter-American Development Bank. See E Fahey, 'Digital Trade and Data Equivalency: Research Briefing for the Welsh Parliament' (Welsh Parliament, 2020).

[17] Wu (n 16) 8.

agreements with e-commerce provisions.[18] Certain country agreements have been uniquely consistent across their respective provisions relating to data, eg South Korea e-commerce chapters as to consumer protection, paperless trading and data protection. But mostly this inequity and practice of inconsistency prevails. Certain countries and regions are notable for their commitment to significantly *changing* their approaches over the year.[19] EU trade agreements have historically merged trade in services with establishment and electronic commerce, rather than giving e-commerce a standalone chapter.[20] In more contemporary post-Lisbon trade agreements with developed global economies, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), initial practice saw a standalone e-commerce chapter. The EU subsequently negotiated the EU-Japan Economic Partnership Agreement (EPA), which has an e-commerce chapter covering trade in services, investment liberalisation *and* e-commerce. More recent negotiations with Australia, Mexico and the UK have seen the EU adopt US terminology on digital trade and tend to provide for a separate chapter on digital trade aligned with services to a degree but still standing more apart than in earlier agreements, discussed further below, with provisions for very high levels of protection for data.[21] These developments underscore the unsettled state of digital trade globally. Yet this is where the EU has stepped in, at ultilateral level, to make a significant contribution; this the focus of this chapter.

Digital trade sits within a complex broader matrix. Until recently there were no reliable measurements of data flows, and any assessment of their contribution to value-creation lacked solid methodological grounds.[22] Rather, wholesale extrapolations from estimations of data flows and their value to the effect of domestic privacy regulation have resulted in a skewed picture. Internet traffic suffers from double counting because Internet protocol traffic is not linear and can be routed through several countries.[23] There is no agreed definition of digital trade or, more broadly, of digital economy. As a result, the methodology to be applied to data flows may be said to be doubly flawed. It is said that framing the protection of personal data as a barrier to trade focuses only on the cost side of things, ignoring the individual and societal benefits of stronger data protection. Ultimately, this approach generates a polarised landscape that ignores the possibility of a win-win between the protection of privacy and personal data, on the one hand, and of cross-border data flows, on the other. Digital trade is increasingly fragmented and

[18] J-A Monteiro and R Teh, 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) WTO Working Paper ERSD-2017-11, 10.

[19] ibid 11.

[20] Fahey (n 16).

[21] Advanced economies closely connected to the EU, such as the EEA, have historically not necessarily sought a broad e-commerce chapter either: Wu (n 16) 8.

[22] See Datahub Global Data Governance Mapping Project (n 6); Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3).

[23] S Yakovleva and K Irion, 'Pitching Trade Against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) *International Data Privacy Law* 201.

dependent on data flows and the broader regulatory capture of data. This chapter argues that the EU is a complex emerging actor in digital trade, leading with exceptionally high standards and a highly bureaucratised design for its regulation. The EU is generally agreed to be cautious and to have repurposed itself with modest innovations, but it largely constitutes an outlier because of its focus on rights. The EU faces many challenges in upholding this position but by subscribing to internationalisation and multilateralism it seeks to make significant inroads in global governance. Regulatory cooperation is shown in this chapter (and further in Chapter 5) to be a tool that the EU uses to develop deeper partnerships with developed economies. The 'Brussels Effect' alone does not explain the success of the EU, nor explain the EU's complexity. This chapter shows how a commitment to multilateralism in institutional design and institutional practice is important in contemporary digital trade.

Chapter 2 contains the following sections: (II) the EU's shift beyond a mid-way position on digital trade; (III) the WTO as a forum for digital trade; (IV) data localisation in trade agreements; (V) FTAs and data privacy; (VI) the EU's horizontal strategy on data internationalisation and the institutionalisation of data privacy; (VII) EU digital trade regulatory cooperation; and (VIII) Conclusions.

II. The EU Moving Beyond the 'Mid-Way' Position on Digital Trade

There is no one accepted or objective definition of 'digital trade' or 'electronic commerce'; international economic law is understood to be mired in archaic understandings of these terms because of uncertainty as to its goods or services characterisation.[24] Digital trade usually relates to provisions on data and consumer protection, provisions on cross-border data flows and data localisation provisions, temporary prohibition of custom duties levied on electronic transmissions, provisions on regulatory cooperation and definitions of e-commerce and digital products. Whilst this debate as to what is old or new terminology goes on, other regions of the world have moved on from digital trade terminology altogether, towards modular discussions of regional cooperation on digital economy issues, viewed in the broadest of terms.[25] Digital trade is still conventionally understood to have evolved in two genres – narrow and broad – with the EU traditionally falling between the two extremes of the US's more digital-focused understanding of trade, and the Chinese approach, focused on the 'trade' aspect.[26] Thus, historically,

[24] AD Mitchell, 'Towards Compatibility: The Future of Electronic Commerce within the Global Trading System' (2001) 4 *Journal of International Economic Law* 685.

[25] Thereby differing from the WTO's single undertaking approach that comprehensive FTAs have replaced.

[26] Mitchell (n 24); H Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade' (2017) 21 *Journal of International Economic Law* 297.

China has promoted a narrow view of digital trade, focusing on trade in goods online, while the US and others have subscribed to a more inclusive approach.

Structurally, e-commerce was elevated from a small number of articles in other chapters into a standalone chapter in trade agreements. The EU is thought to stand out amongst WTO members for having made the greatest changes in its approach to e-commerce in Preferential Trade Agreements (PTAs) over the years, although for very different economic and geopolitical factors than others such as the US and China.[27] It is regarded as a latecomer to many key issues in digital trade and most of its earlier efforts lack real 'normative' value and are not regarded as game-changers. These factors have seen the EU carve out cultural and audio-visual services from its Common Commercial Policy whilst reconciling the differing policy perspective of DG Trade and DG Justice towards digital governance over a relatively short period of time. The EU is said to subsequently pursue a much more activist free trade agenda as to digital content and cross-border data flows in PTAs, while China has adopted a more restrictive stance towards information and communication technologies.[28] E-commerce disciplines expanded from passive non-interference obligations into more positive requirements that specify what the government needs to do for e-commerce businesses. This new model of e-commerce obligations started out in the 2004 FTAs signed by the US with Australia, Chile, and Singapore, respectively, and culminated in the Trans-Pacific Partnership (TPP) that was concluded in 2016. While the Trump administration withdrew from the TPP, its e-commerce chapter was heavily influenced by the US and has been incorporated into the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that the remaining 11 TPP members signed in March 2018.[29] The TPP is not the first FTA to have an e-commerce chapter, and as discussed below, many FTAs signed by Australia and Singapore have substantial e-commerce chapters, which paved the way to the TPP negotiations.[30] The 'digital trade' provisions in the US-Mexico-Canada Agreement (USMCA) largely follow TPP's model, promoting the so-called Silicon Valley consensus of this era. However, the USMCA deviates from TPP in its framing.

[27] P Sauvé and M Soprana, 'The Evolution of the EU Digital Trade Policy' in M Hahn and G Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Brill Nijhoff, 2020) 287; Wu (n 16); H Horn et al, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33 *The World Economy* 1565; Ferracane et al (n 2).

[28] Sauvé and Soprana (n 27) 288.

[29] The chapter on e-commerce in CPTPP was not changed from that in TPP. However, several side letters have been added, which seem to have an implication to the bindingness of the rules. Most notably, Vietnam and the partners signed side letters on cybersecurity. It was agreed that the partners shall refrain from having recourse to dispute settlement with respect to measures adopted or maintained pursuant to the Cybersecurity Law of Vietnam or related legislation, which are alleged to be in violation of Vietnam's obligation under Art 14.11 (Cross-Border Transfer of Information by Electronic Means) and Art 14.13 (Location of Computing Facilities), for a period of five years. See S Hamanaka, 'The Future Impact of Trans-Pacific Partnership's Rule-Making Achievements: The Case Study of E-Commerce' (2019) 42 *World Economy* 552.

[30] Hamanaka (n 29).

While TPP used 'electronic commerce' as an umbrella term, in line with WTO terminology, USMCA has shifted towards 'digital trade', which avoids some of the confusion caused by the colloquial use of the term 'e-commerce' to mean online shopping.[31] The USMCA thus has a chapter (Chapter 19) on digital trade rather than e-commerce, unlike the CPTPP (Chapter 14), the successor to TPP. It is reasonable to expect that similar provisions will be reflected in future US FTAs. While the EU's approach to data institutionalisation has been progressive and holistic, post-Lisbon the EU has merged e-commerce with trade in services and only recently moved to separate digital trade. It has thus moved closer to the US negotiation position and lexicon but also notably merged digital trade and services in some key recent trade agreements, eg the UK-EU TCA.

Historically, many preferential trade agreements signed by the EU also contain provisions addressing issues relating to electronic commerce that are treated in other parts of the agreement. Most frequently, such provisions can be found under a different section within the trade agreement chapters dedicated to trade in services, investment and electronic commerce.[32] In particular, examples relate to provisions governing access to and use of the Internet, which are typically found in PTA sections addressing electronic communication networks and services. Provisions as to digital trade and data processing have been found in sections on financial services or intellectual property other than electronic commerce. Privacy provisions or provisions as to personal data protection are typically scattered across parts of EU agreements, although with considerable variance. A question arises as to the dominance of 'Silicon Valley logic' or the so-called 'Washington Consensus' in digital trade going forward, as to pro-market liberalisation in a likely future era of Big Tech regulation. It seems clear that a certain trade policy continuity from the Obama to the Trump administration took effect through the survival of CPTPP and thus beyond ideological divisions on the nature of the future digital economy.[33] While the Obama administration maintained close contacts with Silicon Valley companies, efforts by the Trump administration to build connections to the tech sector quickly withered and the sector has toed a complex line on America First. Nevertheless, US Internet corporations remain 'first' in the world, rivalled only by their Chinese counterparts. Furthermore, US tech companies' delivery of online services abroad creates a trade surplus that counterbalances the US trade deficit generated by trade in goods – one of the key fixations of former US President Trump and some of his advisors. The collapse of the TTIP negotiations and the incarnation of TPP in CPTPP without the US, yet adopting key US principles and norms, are thus of significance in understanding the place of the EU here. This is particularly the case in relation to data standards, where US law seems

[31] T Streinz, 'Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy' in B Kingsbury et al (eds), *Megaregulation Contested* (Oxford University Press, 2019) 317.

[32] Sauvé and Soprana (n 27) 294.

[33] Streinz (n 31).

to be shifting closer to EU law, largely spurred by US tech companies with world headquarters or substantial markets in the EU, as is explored in Chapter 4 and in the light of RCEP developments, discussed in Chapter 6.

While data has continued to occupy a complex place in all major global trade agreements in recent times, large trade agreements, such as the megaregionals CPTPP and USMCA, data's precise relationship to privacy has been somewhat overlooked. For example, USMCA contains a chapter (Chapter 19) on digital trade, rather than e-commerce like the CPTPP (Chapter 14) and so distinct differences between the two major agreements exist as to international privacy regimes cited, data localisation, interactive computer services etc.[34] They have an unclear relationship with the human right to access information or control information and privacy.[35] They reflect the broader trend that transnational consumer protection and cybersecurity are weak. More substantively, one might say that USMCA deviates significantly from TPP in its framing, as TPP had used electronic commerce as an umbrella term, in line with WTO terminology. As noted above, the USMCA shifted towards the term digital trade, which avoids the confusion caused by colloquial use of e-commerce for online shopping.[36] Similarly, the EU has notably shifted towards the US terminology. However, the economic as opposed to rights-based construction of privacy as between APEC and the General Data Protection Regulation (GDPR) constitutes a significant challenge for the future in the search for global standards or the workability of data localisation in an era of privacy.

The place of the EU as a first-mover internationally on best practice in data protection and data flows on account of the high standards of the GDPR will be unavoidably significant for many countries. The EU's Digital Strategies published in 2018 and 2020 indicated unambiguously the institutional, regulatory and international contours of the EU as a global digital player.[37] A European Strategy for Data was published in February 2020. The Strategy, which was accompanied by a significant White Paper on Artificial Intelligence,[38] was designed to develop a Single Market in data by 2025 and a Common European Data Space, focusing upon tackling, inter alia, fragmentation between Member States in nine areas, ranging

[34] See Streinz (n 31); P Leblond, 'Digital Trade at the WTO – The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation' (2019) CIGI Papers No 227, https://www.cigionline.org/sites/default/files/documents/no.227.pdf accessed 27 February 2022.

[35] Burri and Polanco (n 5).

[36] Contrast USMCA ch 19 with TPP ch 14. See Streinz (n 31) 315.

[37] European Commission, 'Communication from the Commission: European Commission Digital Strategy; A digitally transformed, user-focused and data-driven administration by 2022' C (2018) 7118 final; European Commission, Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, 'Shaping Europe's digital future' COM (2020) 67 final.

[38] European Commission, White Paper 'On Artificial Intelligence – A European Approach to Excellence and Trust' COM (2020) 65 final.

from industrial manufacturing to health, financial, energy, and agricultural data.[39] Indeed, its approach to regulating such a cutting-edge area as AI is to embed EU policies heavily in international and multilateral frameworks, from the OECD, G20, Council of Europe and UNESCO to the International Telecommunications Union and the WTO with respect to policies of third countries that limit data flows and create undue restrictions on bilateral trade negotiations, whilst establishing a High Level Expert Working Group on AI. Overall, the EU advocates a message of tech sovereignty as its future, promoting the capability the EU must have to make its own choices on its own values and own rules, predicated on an emerging regime of institutionalisation of compliance, enforcement and governance.[40] It is a highly ambitious set of objectives. However, time will tell whether its implementation is plausible, given the many delays in the roll-out of data matters; the lack of complete implementation of prior policies, eg Digital Single Market, indicate that ambition can have severe limitations in data matters.

III. The WTO as a Forum for the Future of Digital Trade?

As considered above, e-commerce is said to be no longer a marginal chapter in FTAs.[41] However, there is no settled definition of electronic commerce or e-commerce. At its broadest, electronic commerce involves conducting business using most modern communication instruments: telephone, fax, television, electronic payment and money transfer systems, Electronic Data Interchange, and the Internet. Yet these developments were not reflected at the WTO until recently, as its role appeared to be ever-diminishing amongst the innovations taking place at bilateral and region level. The WTO recognises that commercial transactions can be broken into three stages: the advertising and searching stage; the ordering and payment stage; and the delivery stage. It is commonly assumed that the digital trade provisions in PTAs build upon the rules of the WTO. Although one study showed that 108 PTAs had e-commerce chapters, only 48 agreements had a reference to the applicability of WTO rules to e-commerce, and these were mainly found in agreements where the EU is a party.[42] The *US–Gambling WTO Appellate*

[39] European Commission, Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, 'A European Strategy for Data' COM (2020) 66 final.

[40] European Commission, Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future (19 February 2020).

[41] P Mavroidis, 'Trade Regulation, and Digital Trade' (2017) Columbia School of International and Public Affairs Working Paper; Gao (n 26); Hamanaka (n 29). It is often said that one of the major contributions of TPP was its inclusion of e-commerce although as a term it appears surpassed by digital trade as an agenda: see Gao (n 26).

[42] Burri and Polanco (n 5) 197.

Body case saw the General Agreement on Trade in Services (GATS) commitments apply to electronically supplied services but it also clarified key notions of services regulation, such as the application of the likeness test and the scope of the 'public morals/public order' defence under the general exceptions of GATS Article XIV.[43] However, much WTO law – in particular GATS provisions – was designed to allow WTO members to tailor their commitments. Others relate to outdated, pre-internet classifications of goods, services and sectors, upon which these commitments were based and which have become increasingly disconnected from modern trade practices.[44]

In early 2016, e-commerce gained 'renewed interest' among WTO members: seven proposals were tabled by major WTO members such as the US, the EU, Japan and Brazil. The US proposal appeared to be encouraged by its success in the Trade in Services Agreement – although that has subsequently disappeared – and TPP negotiations. Electronic commerce has wound its way into both a WTO Ministerial Decision and a Joint Ministerial Statement, but also became the subject of a joint initiative by the WTO, the World Economic Forum, and the Electronic World Trade Platform (eWTP), the first of its kind in the WTO. With these signs, e-commerce was set to become one of the first 'Doha' issues to bear fruit in the form of the Joint Statement Initiative (JSI) on e-commerce.[45] Currently, however, negotiations on a plurilateral agreement on e-commerce, which began in 2019 and cover a range of rules on digital trade, have stalled. The negotiations have been structured around six focus groups, 'enabling digital trade/e-commerce', 'openness and digital trade/e-commerce', trust, cross-cutting issues and telecommunications. Notably the EU is actively attempting to promote its model articles; thus, as a forum it has much potential but arguably less promise. There has been some concern from civil society about the manner in which this JSI is perceived to be more representative of the views of Big Tech. The EU space for policy innovation eg as to AI, high privacy protection, spam and disinformation, 'ratchets' upwards. The complex position of the EU here becomes more interesting for its rights-based focus, as examined below, and for its capacity to engage with areas that are a key focus of China, such as sovereignty and security, though these terms may have radically different meanings for different parties.

Due to the widely diverging views of WTO members, efforts to revamp the rules in the WTO have historically largely failed in this area. Given the lack of progress in the WTO, the US, as the champion of digital trade, had turned to various bilateral, plurilateral, and regional initiatives to push for the internationalisation of digital trade rules that are based on the regulatory philosophy and

[43] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* App no WT/DS285/26 (WTO).

[44] M Burri, 'The Regulation of Data Flows Through Trade Agreements' (2017) 48 *Georgetown Journal of International Law* 407, 413.

[45] See WTO, 'Joint Statement on E-commerce News Archives', www.wto.org/english/news_e/archive_e/jsec_arc_e.htm accessed 27 February 2022.

approach in the US to tackle trade barriers facing the US companies. Meanwhile, although initially reluctant to engage, China has also become more willing to negotiate e-commerce rules in its recent FTAs, eg RCEP, discussed in detail in Chapter 6. A 1998 WTO moratorium on import duties on e-commerce transmissions was due to lapse in 2020, with concerns from developing countries about lost government revenue where trade becomes less goods-intensive and more digital. On 10 December 2019, WTO members adopted a decision on the Work Programme on Electronic Commerce.[46] In that decision they agreed to reinvigorate the Work Programme and to renew the practice of not imposing customs duties on electronic transmissions until Ministerial Conference 12 (MC12) in Geneva in 2021. These developments have doubtless been exacerbated by Covid-19, which has put increasing pressure on states and organisations for revenue, as the EU Digital Services Tax indicates, and has hampered much multilateral progress across the board with regard to law-making and regulation, discussed below. However, from an EU perspective, the place of the transatlantic relationship in leading change on a Transatlantic Trade and Technology Council (EU-US TTC), as proposed by the EU in late 2020 and already in place by Autumn 2021, could provide an important foundation on which multilateral developments can be built – discussed further in Chapter 4.[47] Much also depends on the future of the WTO and its dispute settlement system, the traditional forum for the navigation of disputes. The WTO has not yet explored the boundaries of barriers to trade in relation to the Internet in a robustly institutionalised format.

IV. Data Localisation in Trade Agreements

Digital protectionism has been defined by some to include laws and regulations that block the flow of data across borders or impede the provision of services such as cloud computing.[48] There are limits to digital trade and there are also many broad philosophical debates about what the contours of digital protectionism might be. The EU has been accused of digital protectionism in many contexts, despite its broader organisational goals of promoting free and fair trade and protecting consumer rights. It thus remains a somewhat complex idea to frame realistically. As noted above in Chapter 1, data-related provisions are a relatively new phenomenon in trade agreements. Before the year 2000, only 19 measures had been imposed globally. However, by 2008, that number had more than doubled, and it has doubled again since then.[49] These measures are primarily found in

[46] WTO, 'Work Programme On Electronic Commerce: General Council Decision, Adopted on 10 December 2019' (2019) WT/L/1079.

[47] See the discussion below in Ch 4.

[48] Eg United States Trade Representative (n 9).

[49] Ferracane et al (n 2).

dedicated e-commerce chapters. Where they appear in agreements, they outline rules either referring to the cross-border flow of data or banning or limiting data such localisation requirements. Provisions on the cross-border flow of data can, however, also be found in chapters dealing with discrete services sectors, where data flows are key or indeed inherent to the very definition of those services, eg telecommunications and the financial services sector. As Burri and Polanco state, data localisation now constitutes in the vast majority of trade agreements a *hard law* or binding measure as opposed to the soft law locus of data-related measures in earlier agreements: almost all localisation measures are binding now.[50] Recent surveys of digital trade restrictiveness show that the majority of contemporary data localisation measures impose conditional flow regimes, ie there are certain conditions that have to be fulfilled before the data can be transferred abroad.[51] In addition, many belong to the most restrictive category of bans on transfer and local processing requirements, eg requiring a company to use a local server for the main processing of the data and, in the case of a ban on transfer, not even a copy of the data can leave the implementing jurisdiction.[52] Finally, a smaller cohort contains local storage requirements, which means that a copy of certain data has to remain within the country, although the data itself can be processed abroad.[53] It is important to note that recent OECD data on digital trade-related restrictions indicates a solid rise in restrictions since 2014.[54] However, the Covid-19 pandemic has witnessed a significant lessening of restrictions, eg digital signatures law globally. Internet restrictions on data flows also continue to rise.[55]

The first agreement to include data localisation provisions was the 2015 Japan-Mongolia FTA, and Asia continues to be a key focus for digital trade matters. The Japan-Mongolia FTA provides that neither party 'shall require a service supplier of the other party, an investor of the other party, or an investment of an investor of the other party in the area of the former party, to use or locate computing facilities in that area as a condition for conducting its business'. The 2016 TPP included provisions on the location of computing facilities, in Article 14.13, kept without change in the CPTPP.[56] The TPP explicitly sought to restrict the use of data localisation measures. Measures restricting digital flows or localisation requirements under Article 14.13 of the TPP were permitted only if they did not amount to an arbitrary or unjustifiable discrimination or a disguised restriction on trade and did not impose restrictions on transfers of information greater than required to achieve the objective. The ban on localisation measures was softened as regards

[50] Burri and Polanco (n 5) 212, 214.
[51] Ferracane et al (n 2) 56.
[52] ibid.
[53] ibid.
[54] See OECD Digital Services Trade Restrictiveness Index (n 6).
[55] Ferracane et al (n 2).
[56] See Trans-Pacific Partnership Agreement (TPP), Art 14.14 and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP) (2016), Art 14.13. See also Japan-Mongolia Economic Partnership Agreement (7 June 2016), Art 5.36.

financial services and institutions, which has some merit.[57] As Burri states, the provisions of the TPP were ultimately interesting but did not simply entail a clarification of existing bans on discrimination or set higher standards.[58] Rather, they shaped the regulatory space domestically and could actually lower certain standards. In fact, Burri contends that a commitment to lower standards on privacy and data protection was palpable, with respect for Article 14.82.1 requiring every party to the TPP to adopt or maintain a legal framework that provides for the protection of the personal information of users of electronic commerce.[59] In fact, TPP parties were invited to promote compatibility between their data protection regimes by essentially treating lower standards as equivalent.[60] After TPP/CPTPP, a hard rule on data localisation, largely following the same wording, was included in the 2016 Chile-Uruguay FTA, Article 8.11 and the 2016 updated ASAFT, Article 14.15. A variation on this is to be found in the USMCA, stipulating that no party shall require a covered person to use or locate computing facilities in that party's territory as a condition for conducting business in that territory without considering any further exception, except in the USMCA, which includes a special rule for financial services.[61] Ultimately, we are at a crucial crossroads in relation to the actial meaning of data localisation. For the EU, as outlined above, recent trade agreements have increasingly provided for free flows of data and set out provisions prohibiting 'bad' data localisation.

V. FTAs and Data Privacy: Why the EU's Institutionalisation of Data Privacy Matters

The EU is a very late comer to the place of privacy within trade agremeents, and for long was not considered to be innovative or cutting-edge in its approaches. The EU has, broadly speaking, at least three forms of trade agreement in this domain: (i) preferential trade agreements (PTAs) that are part of a broader framework agreement, encompassing Deep and Comprehensive FTAs, including Association Agreements (AA), eg the EU-Georgia AA 2014, the EU-Moldova AA 2014, the EU-Ukraine AA 2014, and the EU-Serbia 2013 Stabilisation and Association Agreement; (ii) standalone preferential trade agreements (such as the EU-Canada CETA 2016), EPAs, eg the EU-Cariforum EPA 2008, the EU-Japan EPA 2017, and (iii) more recent or next-generation FTAs, such as EU-South Korea FTA 2010, the EU-Colombia and Peru

[57] TPP, Art 14.2.4.
[58] Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3) 115.
[59] ibid.
[60] TPP, Art 14.8.5.
[61] Agreement between the United States of America, the United Mexican States, and Canada (in force 1 July 2020) (USMCA), Art 19.12.

FTA 2012, the EU-Singapore FTA 2018, and the EU-Vietnam FTA 2019. Digital technology for commercial purposes is nonetheless a relatively recent phenomenon dating back to the 1990s, as is evidenced from the scant provisions in the legal texts on electronic transmissions of the WTO from 1994.[62] Some studies indicate that just 30 per cent of all 274 PTAs notified to the WTO by 2017 featured e-commerce provisions.[63] Currently, approximately 80 or more FTAs include provisions on privacy.[64] Yet even in the most large-scale formulation of trade agreements, such as the CPTPP and USMCA, data is understood to be mostly overlooked in the sense that it is difficult to find evidence of a robust and precise relationship between trade and privacy.[65] Most of the earlier agreements dealing with privacy issues largely consisted of non-binding declarations of mere programmatic form, such as the 2000 Jordan-US FTA, which contained a joint statement on electronic commerce where parties could deem it necessary to ensure the effective protection of privacy in the processing of personal data on global information networks.[66] The US-Jordan FTA was the very first FTA to have an e-commerce chapter, though it does not contain any hard obligations. It even recommended the OECD Privacy Guidelines as the appropriate basis for policy developments, although even the OECD points out that this framework has been surpassed by digitisation, interconnected networks and the nature and volume of data flows.[67] However, the shortcomings of trade agreements here need to be acknowledged: they are not holistic tools, are not regulatory forums, they create limited institutions and mostly have weak global centrifugal points underpinning them. They self-evidently mean that further regulation and multilateralism is required.

There have been many schools thought on digital trade, evidencing its evolving contours, from studies on e-commerce allowing for an understanding of how to identify and classify provisions relating to digital trade based on the content and scope of application, to all disciplines and obligations impacting digital trade beyond e-commerce. As will be outlined here, a significant shift eventually took place in EU agreements, where the EU has sought to elevate the place of privacy protection in electronic communications requiring transfers of data, following the broader trends of trade agreements – generally affirmatively protecting individuals' rights.[68] This has been done, for example, by increasingly referencing the

[62] Sauvé and Soprana (n 27) 286.

[63] See WTO Database on Preferential Trade Arrangements: http://ptadb.wto.org/?lang=1 accessed 27 February 2022.

[64] Monteiro and Teh (n 18).

[65] Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3). See Monteiro and Teh (n 18).

[66] Burri and Polanco (n 5).

[67] Jordan-US Joint Statement on Electronic Commerce (7 June 2000) Art II; The OECD Privacy Framework: Supplementary explanatory memorandum to the revised recommendation of the council concerning guidelines governing the protection of privacy and transborder flows of personal data (2013); OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980).

[68] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, Art 13.1 and Art 99(d).

processing and dissemination of data, introducing administrative measures, or adopting non-disciplinary practices.[69]

The EU has adopted a range of perspectives as to international standards and data protection:[70] eg EU-Central America, EU-Columbia, or EU-Peru, all providing that e-commerce shall be consistent with international standards of data protection; or EU-Ukraine, which provides that e-commerce must be fully compatible with the highest international standards of data protection. EU agreements include qualifications to these standards, for example giving the parties the right to define and regulate their own levels of protection of personal data in pursuit of public policy objectives and not to be required to disclose confidential or sensitive information or data.[71] The EU has subsequently pioneered special chapters on the protection of personal data including discrete principles.[72] I argue here that the EU ultimately pioneered these developments through the institutionalisation of data.

As developed further below and above, other trade agreements reference or place the criteria or guidelines from relevant international organisations or bodies into their agreements, eg APEC Cross-Border Privacy Rules system Privacy Framework or OECD Recommendations of the Council concerning guidelines governing the protection of privacy and transborder flows of data (2013).[73] These references could in theory be significant for the locating of internationalisation as the centre of gravity in a world of conflicting regimes and conceptual framing. USMCA explicitly recognises the APEC as a valid mechanism to facilitate cross-border information transfers while protecting personal information. Distinct differences exist between major agreements with respect to the international privacy regimes cited, data localisation, interactive computer services and so on which some label to be a 'missed

[69] Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3).

[70] Free Trade Agreement Between the European Union and the Republic of Singapore [2019] OJ L 294/2 Art 8.57.4; Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4 Art 197.2; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/3 Art 119.2; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ 359/3, Art 202; Monteiro and Teh (n 18) 52.

[71] Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA) [2018] OJ L 330/3, Art 18.1.2.h and Art 18.16.7.

[72] Such as purpose limitation, data quality, proportionality, transparency, security, right to access, rectification and opposition, restrictions on onwards transfers, protection of sensitive data, enforcement mechanisms, coherence with international commitments and cooperation between the parties to ensure an adequate level of protection of personal data. See Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part [2008] OJ L57/2 ch 6, Arts 61–65; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, ch 6, Arts 197–201.

[73] USMCA, Art 19.8.2.

opportunity'.[74] The Australia-Singapore Digital Economy Agreement (DEA) is noted to be a world first – an agreement calling for 'interoperability' of data protection regimes, making data protection more effective and coherent internationally.[75] These developments do not change the fact that the EU's regimes are philosophically significantly at odds with economic understandings of privacy, and that interoperability may not be as intellectually robust as its flexible terminology might suggest.[76]

Data-related provisions in trade agreements are a relatively new phenomenon, found primarily in dedicated e-commerce chapters of PTAs as to cross-border flows of data or banning or limiting data localisation rules. Provisions on cross-border data flows are also found in chapters on service sectors, where data flows are inherent to the definition of the service, eg telecommunications and financial services.[77] Non-binding provisions on data flows have appeared since 2000, eg in Jordan-US FTA. In the 2006 Taiwan-Nicaragua FTA the parties affirmed the importance of working to maintain cross-border flows of information as an essential element of promoting a dynamic environment for electronic commerce.[78] An intermediate type of provision, positioned between hard and soft commitments, is found in the 2007 South Korea-US FTA, where the parties – after recognising the importance of the free flow of information in facilitating trade and acknowledging the importance of protecting personal information – declare that they shall endeavour to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.[79] The first agreement with a *binding* provision on cross-border information flows was the 2014 Mexico-Panama FTA, allowing the parties to transmit electronic information from and to their respective territories when required in accordance with the applicable legislation on the protection of personal data and taking into account international practices. The 2016 TPP text appears to have greatly influenced all subsequent agreements, with data flow provisions, stipulating that each party 'shall allow the cross-border transfer of information by electronic means, including personal information when it was for the conduct of the business of a covered person'. It would not prevent a party from 'adopting or maintaining measures to achieve a legitimate public policy objective' provided that the measure was not applied in a manner which

[74] See Leblond (n 34); E Fahey and I Mancini, 'The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations' (2020) 26(2) *International Trade Law and Regulation* 99.

[75] Article 18.7: 'each Party shall encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement or broader international frameworks'.

[76] S Aaronson 'Could Trade Agreements Help Address the Wicked Problem of Cross Border Disinformation' (2021) SSRN Paper, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820213 accessed 27 February 2022.

[77] Burri and Polanco (n 5) 211.

[78] *cf* Canada-Peru FTA (2009); Peru-Korea FTA (2011); Central America-Mexico FTA (2013); Columbia-Costa Rica FTA (2013); Canada-Honduras FTA (2014); Canada-Korea FTA (2015); Japan-Mongolia EPA (2016).

[79] South Korea-US FTA (2007) Art 15.8. See Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3).

could constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade and does not impose restrictions on transfers of information greater than are required to achieve the objective. This provision and the entire e-commerce chapter of the TPP was transposed without change into the 2018 CPTPP. Thereafter, hard rules on data flows have been incorporated into a large range of agreements, maintaining exactly the same wording.[80] It is considered path-breaking that certain countries have sought to consider in future negotiations commitments relating to cross-border flows of information, such as in the 2018 EU-Japan EPA Article 8.81 or in the EU-Mexico Global Agreement under negotiation. This naturally leads to a consideration of the place of the EU.[81]

VI. The EU Horizontal Strategy for Data: The Impact of the Model Clauses

While overall it may be said that the EU's approach to data institutionalisation has been progressive, it is certainly only a recent phenomenon. Similarly, post-Lisbon, the EU has merged electronic commerce with trade in services and has only recently moved to dedicated digital trade chapters, thus moving closer to the US position. The EU has developed a horizontal strategy on cross-border flows of personal data in external trade policy.[82] This strategy was developed in the wake of the introduction of the EU's far-reaching GDPR and the significant post-Lisbon trade agreements negotiated with many leading developed economies.[83] The European Parliament had argued vociferously for internal consistency of external trade policy.[84] Thereafter, the European Commission developed highly significant so-called model 'horizontal' provisions on cross-border data flows and personal data protection in EU trade and investment agreements.[85] The provisions are of value in so far as they purport to incorporate the complex position of the EU into model texts, placing extremely high standards and individual rights at the core thereof, whilst also committing to free data

[80] Chile-Uruguay FTA (2016) Art 8.10; Argentina-Chile FTA (2017) Art 11.6; Singapore-Sri-Lanka FTA (2018) Art 9.9; Peru-Australia FTA (2018) Art 13.11; USMCA (2018); Brazil-Chile FTA (2018); Australia-Indonesia FTA (2019) Art 13.11; Japan-US FTA (2019) Art 11.

[81] See EU-Mexico Agreement in Principle (under negotiation), Art XX, https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 accessed 27 February 2022.

[82] European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)' (2018) Tradoc 156884, https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf accessed 27 February 2022.

[83] The European Commission has set out the mechanisms for international transfers of personal data and clarified the criteria to be taken into account in the adequacy mechanism when selecting third countries, in particular in Asia and Latin America: European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' COM(2017) 07 final.

[84] See European Parliament, 'Resolution Towards a Digital Trade Strategy' (2017) (2017/2065(INI)), www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.html accessed 27 February 2022.

[85] European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection' (n 82). Article A on cross-border data flows reads:

flows and condemning 'bad' data localisation. The clauses have three main elements: so-called Articles A, B and X. Article A provides for a declaratory commitment on cross-border data flows and prohibits restrictions in four data and IT localisation requirements. Article B sets out counterbalancing provisions for national measures as to personal data. Article X on regulatory cooperation with respect to digital trade then provides a carve-out for cross-border data flows and the protection of personal data from the dialogue on regulatory issues. The Commission thereafter submitted these provisions to trade negotiations with Australia, Chile, Indonesia, Mexico, New Zealand, Tunisia and the UK – mostly successfully – and has sought to replace the EU-Japan EPA rendezvous clause, to a degree also in the EU-Mexico modernised FTA.[86] It has also sought to bring its complex position to WTO negotiations on electronic commerce in the Joint Statement Initiative (JSI), discussed above.[87] This particular forum is an important one, at least superficially, because of the EU's unlikely prospect of success in gaining global consensus.[88] Yet the WTO negotiations

> '1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by:
>
> (i) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of a Party;
> (ii) requiring the localisation of data in the Party's territory for storage or processing;
> (iii) prohibiting storage or processing in the territory of the other Party;
> (iv) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Parties' territory or upon localisation requirements in the Parties' territory.
>
> 2. The Parties shall keep the implementation of this provision under review and assess its functioning in 3 years following the entry into force of this Agreement. A Party may at any time propose to the other Party to review the list of restrictions listed in the preceding paragraph. Such request shall be accorded sympathetic consideration.'

Article B on Protection of personal data and privacy states:

> '1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
> 2. Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.
> 3. For the purposes of this agreement, "personal data" means any information relating to an identified or identifiable natural person.
> 4. For greater certainty, the Investment Court System does not apply to the provisions in Articles A and B.'

[86] JA Micallef, 'Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential?' (2019) 53 *Journal of World Trade* 855, 867. See also M Burri, 'A WTO Agreement On Electronic Commerce: An Enquiry Into Its Legal Substance And Viability' (2021) Trade Law 4.0 Working Paper No 01/2021, 18; E Fahey, 'The EU as a Digital Trade Actor' in D Collins (ed) *Research Handbook on Digital Trade* (Edward Elgar, forthcoming) and Yakovleva and Irion (n 23) 214.

[87] Communication from the European Union, Joint Statement on Electronic Commerce, 'EU Proposal For WTO Disciplines and Commitments Relating to Electronic Commerce' INF/ECOM/22 (2019), https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf accessed 27 February 2022.

[88] A large coalition of civil society organisations is critical of the JSI and the proposals currently under discussion, particularly because of concerns that it would enshrine the current status quo, which favours the dominant internet companies.

provide a forum for the EU to seek further institutionalisation of its complex views and this is currently of some importance. This is because the horizontal strategy is understood to be highly ambitious and of much significance to the deeper trade era, as a counterbalance to provisions on labour standards, environmental protections and sustainable development in many trade agreements.[89] The EU confirms that parties safeguards to protect privacy need to be agreed and are not a pretext for abuse or unjustifiable data localisation. It marks an important shift in the EU's trade agreements and normative approach to the protection of data through its institutionalisation. The complex position held by the EU is not entirely without precedent in the era of FTAs: during the CETA negotiations, the EU voiced concerns about the impact on privacy of the disclosure obligations in the agreement.

Afterwards, it has been no less easy, eg the place of free flows of data and privacy were left undetermined and postponed as to the EU-Japan EPA, as noted above and as discussed in detail in Chapter 5, despite the EPA containing many notable provisions on privacy.[90] The horizontal strategy has been only partially accepted by the UK in the EU-UK TCA, where the UK has clearly made known its ambitions to join the CPTPP. In this regard, data flows and localisation bans also feature in the TCA, alongside the replication of the model clauses on the protection of data as a right. However, the word 'fundamental' has been removed from 'data as a fundamental right', and this has caused considerable discussion in analyses which followed. Still, the model clauses are understood to contain a narrower prohibition on restrictions of cross-border data flows than in the so-called US models implemented in the CPTPP, USMCA, US-Japan DTA and China's model implementation of the RCEP; they thus provide the EU with the broad autonomy to protect privacy and personal data.[91] Hence, rather than making provision for an open prohibition to restrict cross-border data flows, the EU model clauses provide for an exhaustive list of the types of restrictions that may be imposed on cross border data flows. Overall, the balance achieved by the model clauses is to assert the EU position more concretely and to be explicit as to the depth of protection.[92] Whether the EU's clauses will cause difficulty for future public policy or ultimately

[89] Yakovleva and Irion (n 23) 219–20.

[90] Eg EU-Japan EPA: Art 10.4.2 (subjecting data sharing regarding temporary entry of business persons to each party's privacy and data protection law); Art 20.5 (affirming that intellectual property related disclose of information was not required if except under either party's privacy laws); Art 21.4.e (subjecting provision of proposed regulations to applicable privacy law) or Art 32.1 of the Protocol on rules of origin and origin procedures (affirming that furnishing or access to information was not required if contrary to either party's personal data protection and privacy law).

[91] See S Yakovleva, 'EU's Policy on Cross-border Data Flows: Navigating the Thin Line between Liberalizing Digital Trade, Promoting Rules-based Multilateralism and Safeguarding Fundamental Rights and Values' in E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Whose Metrics?* (Edward Elgar, forthcoming).

[92] Some argue that the EU's restrictions aim to protect fundamental rights in a manner which is formulated satisfactorily and meet minimum requirements for plausibility under WTO law: see Yakovleva (n 91). See also Mira Burri, 'A WTO Agreement On Electronic Commerce: An Enquiry Into Its Legal Substance And Viability' (2021) Trade Law 4.0 Working Paper No 01/202, 18.

undermine the EU's goals regarding the liberalisation of data flows remains to be seen.

As Yakovleva argues, when comparing the EU's exception from data flows with the narrower exception in US digital trade chapters, it is clear that the US national security exception grants the US and its trading partners much broader autonomy to restrict cross-border data flows than the proposed EU exception, when those restrictions are framed as national security interests.[93] Although the national security exception in US-led trade agreements gives a broad leeway to the US to restrict data flows, it limits the possibilities for restricting such flows on data protection grounds for *other* parties to those agreements. Given that the trading partners with which the EU maintains a free flow of personal data (eg the UK, Japan and Canada) are also parties to those trade agreements with the US, the routing of personal data from the EEA through those countries may allow the circumvention of the GDPR restrictions on data flows, which perceived as unduly onerous under the US-led trade agreements. As a result, Yakovleva argues that the EU is being surrounded by free data flow areas created by US-led trade agreements, which makes it harder in practice for the EU to maintain its stance on data protection. Such a position, however, assumes little from the US as it is likely to shift towards federal protection for privacy and regulation. Such developments, examined in Chapter 4, may not emerge quickly but appear increasingly like to occur as some stage and will change the parameters of many debates in this field, not least the accuracy of where to place the EU within the 'spaghetti-bowl' mixture of trade agreements internationally, intersecting in awkward and messy spaces.

VII. EU Digital Trade Regulatory Cooperation: Deepening the Nature of Institutionalisation

Forms of institutionalisation of digital trade in PTAs

Establishment of sub-committee/working group on e-commerce
Functions of sub-committee/working group
Coordination of information exchange
Possibility to establish a working group on e-commerce
Establishment of joint/sub-committee on paperless trading
Establishment of committee on trade in services, establishment and e-commerce
Possibility to conclude implementing arrangements

Source: J-A Monteiro and R Teh, 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) WTO Working Paper ERSD-2017-11.

[93] ibid.

Only a very limited number of trade agreements establish specific institutional arrangements for e-commerce and it is important to emphasise that existing provisions vary enormously across agreements. Thus, the idea of an institutional infrastructure within digital trade is still highly limited and the account here draws from the work of Monteiro and Teh to typologise this. Some such institutional arrangements establish sub-committees to review and monitor the implementation and operation of the chapter. Some supervise and assess implementation of the relevant chapter (eg EU-Korea), whilst others establish a dedicated joint committee.[94] Other forms of intuitional arrangements include working groups or the possibility of creating a working group in charge of certain tasks.[95] Others envisage working groups of experts. Post-Lisbon, EU trade agreements include a vast array of institutional arrangements for their implementation.[96] Historically, the most usual form of institutionalised cooperation envisioned by the EU in digital trade is regulatory cooperation overseen by joint committees. More recent chapters on digital trade, eg those in the EU-UK TCA or the EU-Australia agreements suggest that there has been a significant shift away from these structures to more lithe and sparse arrangements, which tend to be shorter, set out fewer cooperation provisions generally and contain few commitments to multilateralism, indicating a different vision for engagement.

From the OECD to the EU, regulatory cooperation has a variety of meanings and is a broad church of ideas, schemas and practices. For instance, the OECD definition of 'regulatory cooperation' is the range of institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule making and implementation, subject to the constraints of democratic values such as accountability, openness, and sovereignty.[97] Yet regulatory cooperation

[94] eg on paperless trading: see Japan-Singapore EPA, entered into force 30 November 2002, revised 2007. See Monteiro and Teh (n 18) 68, who find only 16 agreements.

[95] eg regulatory issues as to trade in services, establishment and e-commerce: Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (EU-Colombia-Peru FTA) [2012] OJ L354/3.

[96] I Mancini, 'Fundamental Rights in the EU's External Trade Relations: From Promotion "Through" Trade Agreements to Protection "In" Trade Agreements' in E Kassoti and R Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER, 2020).

[97] OECD, 'International Regulatory Co-operation – Adapting Rules to an Interconnected World' (2020), www.oecd.org/gov/regulatory-policy/irc.htm accessed 27 February 2022; B Hoekman, 'International Regulatory Cooperation and Trade Agreements' in E Brousseau et al (eds), *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (Oxford University Press, 2019); J Wouters and A Andrione-Moylan, 'The Changing International Cooperation Network of the EU: The Inclusion of Informal (Regulatory) Bodies' in RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar, 2019); J Nakagawa, 'Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges' in J Chaisse and T Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016); AR Young, 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New Generation" Preferential Trade Agreements' (2015) 22 *Journal of European Public Policy* 1253; B Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization' (2015) 18 *Journal of International Economic Law* 609; R Quick, 'Regulatory Cooperation – A Subject of Bilateral Trade Negotiations or Even for the WTO' (2008) 42 *Journal of World Trade* 391; E Golberg, 'Regulatory Cooperation – A Reality Check'

ranges from relatively informal and unstructured, occasional or ad hoc – eg sharing best practices or simply sharing information – to the more formal, such as mutual recognition agreements and wholesale harmonisation of regulatory frameworks. International regulatory cooperation is more conventionally understood to involve shaping and complying with international agreements, utilising international evidence, collaborating with international counterparts – either bilaterally or through multilateral forums when designing and enforcing regulations.[98] Recognising existing regulations and standards that achieve the same policy objective at lower costs can, to some, be seen as regulatory cooperation.[99] In the transatlantic context, some define regulatory cooperation as the process of interaction between US and EU regulators, founded on the benefits that regulators can achieve through closer partnership and greater regulatory interoperability.[100] Thus, irrespective of the precise definition, there is a significant dimension of institutional action to generate convergence in rule-making. Regulatory cooperation has become of immense international significance because it prevents regulatory divergences and non-tariff barriers. It is to be found dealing with the most important impediments to trade in many leading contemporary international trade agreements, eg the CPTPP and latest deep EU FTAs with South Korea, Canada, the UK, Singapore and Japan. There is no shared idea of regulatory cooperation as to digital trade in regional trade agreements but a rising prevalence of data regulation and no shortage of examples of significant regulatory cooperation. Regulatory cooperation bodies within trade agreements do not formally constitute institutions or fit within standard taxonomies of institutions. But they do form part of the architecture of bodies found within trade agreements.

Provisions calling on parties to cooperate on regulatory issues relating to e-commerce through regular dialogue and exchanges of information are found amongst the most recent PTAs signed by the EU in the last decade. The issues most frequently listed in the vast majority of EU PTAs include: recognition of certificates of electronic signatures issued to the public and facilitation of cross-border certification services; the liability of intermediary service providers with

(2019) M-RCBG Associate Working Paper Series No 115, www.hks.harvard.edu/sites/default/files/centers/mrcbg/img/115_final.pdf accessed 27 February 2022.

[98] J Wiener and A Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory' (2015) 78 *Law and Contemporary Problems* 103; R Bull et al, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' (2015) 78 *Law and Contemporary Problems* 1; W Mattli and N Woods, 'In Whose Benefit? Explaining Regulatory Change in Global Politics' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009).

[99] UK Department for Business, Energy & Industrial Strategy, 'International Regulatory Cooperation for a Global Britain: Government Response to an OECD Review' (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913730/international-regulatory-cooperation-for-a-global-britain.pdf accessed 27 February 2022.

[100] US Chamber of Commerce, 'Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)', www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_-chamber_ttip_paper_-_final_3-02.pdf accessed 27 February 2022.

respect to the transmission or storage of information; the protection of consumers in the ambit of e-commerce. Other issues to be found in EU FTAs signed in the early 2000s called for regulatory cooperation relating to paperless trading and the protection of personal data.[101] The EU has sought to include regulatory cooperation its post-Lisbon trade agreements with all major developed global economies. This is particularly so in the area of digital trade or e-commerce in all of its post-Lisbon trade agreements with all major developed global economies.[102] Many such articles of the regulatory cooperation chapters are heavily embedded in multilateralism. Article 16.4 of the CETA provides for international standards of data protection for both parties into the concepts of trust and confidence in e-commerce. Arguably, articles such as CETA Article 16.6, which thus embeds internationalisation into dialogue on e-commerce to include multilateral forums constitute more far-reaching commitments to multilateralism. To similar effect is Article 8.80 of the EU-Japan EPA, which provides that:

1. The Parties shall, where appropriate, cooperate and participate actively in multilateral fora to promote the development of electronic commerce.
2. The Parties agree to maintain a dialogue on regulatory matters relating to electronic commerce with a view to sharing information and experience … including on related laws, regulations and their implementation, and best practices with respective to electronic commerce. (…).

The span is important because it suggests a very broad relationship and many instruments to underpin that relationship. What is thus significant about regulatory cooperation provided for in Article 16.6 of CETA and Article 8.88 of the EU-Japan EPA is the extent to which internationalisation and multilateralism are embedded within the dialogue for engagement.[103] Still, regulatory cooperation becomes a key mechanism with which the EU and other leading international partners can develop economy studies and central features of the digital trade landscape. It is important to state that the dialogue that is taking place in these post-Lisbon trade agreements on digital trade or e-commerce generally has a broad reach and may be extremely ambitious. CETA enables dialogue to take place in a variety of forums and ways but in particular in multilateral forums, for example in CETA Article 16.6

[101] Eg Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, Art 7.49; EU-Columbia-Peru FTA, Art 163.

[102] Eg Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23, Ch 16 or EU-Japan EPA, Ch 8.

[103] By contrast, in more recent EU trade agreements such as the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ST/5198/2021/INIT (EU-UK TCA) [2021] OJ L149/10, we see in the regulatory cooperation chapter there and in the entire chapter a significantly *lesser* interest in the internationalisation of regulatory cooperation and multilateralism. We also see this in more recent negotiations, for example between the EU and Australia, similarly outlining a slimmer component of the areas for regulatory cooperation engagement.

paragraph 3. This insertion of international cooperation within regulatory dialogues is a very new form of engagement with international partners; it is also replicated in the EU-Japan EPA, in Article 8.88.[104]

These commitments to multilateralism in the EU's efforts at regulatory cooperation are notable and distinctive. Yet they sit uncomfortably against the backdrop of a severe lack of activity at a multilateral level, in particular at the WTO. As noted above, only in 2016, did e-commerce garner 'renewed interest' among WTO Members, where seven proposals were tabled by major WTO Members such as the US, the EU, Japan and Brazil, now the subject at the WTO of a Joint Statement Initiative (JSI) on e-commerce.[105] The EU has been leading technical discussions in plenary and in small group and the co-convenors include Australia, Japan and Singapore. Notably, the EU is actively attempting there to promote its model horizontal articles to embed data flows and data privacy within digital privacy – including key provisions on regulatory cooperation. Many remain unconvinced that the WTO can realistically act as a locus for the scale of law-making ahead. Such law-making has a vast array of key objectives, because it needs to modernise digital trade *and* to engage with the global split between East and West on economic or individualised privacy etc; this constitutes a lengthy shopping list.[106] The EU thus in its relations with third countries champions regulatory cooperation predicated on international standards and seeks regulatory cooperation in the absence of a global consensus on standards. Frequently, the EU appears to agree with partners that multilateralism, international standards and global forums are the starting point.

Returning to the broader point then, bilateral regulatory cooperation is thus a very important means by which the EU can develop its institutionalisation of data regimes. The EU has formulated many significant innovations in the field of data in its trade agreements. All in all, regulatory cooperation is a very important way of engaging with third country partners in this new era of deeper trade agreements because it demonstrates that willingness to be a global leader but also to lead with other significant global matters.

These engagements lead to important multilateral developments and participation structures. In other words, institutionalisation *appears to lead to further institutionalisation*. The international dimension of this have taken their engagement to extremely positive heights, ie the EU and Japan in the context of the WTO have made important efforts to evolve the WTO institutional AB stalemate out of its current impasse. The international dimension of this institutionalisation is thus a key springboard for the *reach* of institutionalisation.

[104] There are significant nuances in how the EU engages with cybersecurity, discussed in Chapter 3.

[105] WTO, 'Joint statement on e-commerce news archives' (n 45). The negotiations have been structured around six focus groups. Negotiations on a plurilateral agreement on e-commerce, covering a range of rules on digital trade, have yet to come to a conclusion.

[106] See S Aaronson and P Leblond, 'Another Digital Divide: The Rise of Data Realms and its Implications for the WTO' (2018) 21 *Journal of International Economic Law* 245.

VIII. Conclusion

Digital trade may be used as a key case study of the EU's development, along with its partners, of institutional design and the rollout of high-level binding standards for the flow of data, an area previously neglected in international economic law. The EU advocates, mostly with developed third countries, for regulatory cooperation predicated on international standards. It seeks regulatory cooperation even in the absence of a global consensus on such standards. This has formed part of the EU's key push for trade in the post-Lisbon era, striving to write the global rule-book. The EU continues to implement and propagate its complex position on digital trade at a multilateralism level and has developed important practices on how to implement best practice through institutions. Digital trade involves many actors, bottom-up, and suffers from an identity crisis as to its facets and functions in the contemporary legal order. The global legal order appears increasingly fragmented, with multiple regimes in digital trade with respect to data flows – split between the EU and many other forms of regime. The high standards of the EU represent an important counterbalance to a variety of global actors who would promote economic standards over individual rights. The WTO, for various reasons, appears unlikely to constitute the forum for significant change for now. Most of the world seems to be coming closer to the EU's position but significant gaps still remain. How to maintain high standards of privacy yet also advocate a liberal stance remains a conundrum for the EU. The EU has largely a mixed position, mid-way between key actors such as the US and China, as a middle ground actor in digital, yet this metaphor appears rapidly surpassed by practice. In Chapter 4 the future of the EU-US relationship on data flows is explored. This seems to have an outsized impact on the future of data privacy in digital trade provisions. Ultimately, it remains a challenge to see whether the EU's institutionalised vision of data can succeed in future negotiating forums.

10

Data Protection and Artificial Intelligence

The European Union's Internal Approach and Its Promotion through Trade Agreements

Alan Hervé[*]

I INTRODUCTION

Europeans have only recently realized their weaknesses and the risk of remaining at the margins of the fourth industrial revolution[1] artificial intelligence (AI) is expected to bring about. Despite the existence of the single market, Europe industrial policy, including policy in the field of AI, still suffers from a lack of coordination and frequent duplications between member states. Moreover, investments in AI research and innovation remain limited when compared with Asia and North America.[2] As a result, European companies are in a weak position in terms of consumer application and online platforms, and industries are suffering from a structural disadvantage in the areas of data access, data processing and cloud-based infrastructures still essential for AI.

However, this gloomy overview calls for some nuance. The European Union (EU) and its member states are still well placed in the AI technological race, and the European economy benefits from several important assets, remaining not only an AI user but also, more critically, an AI producer. Europe[3] is still a key player in terms of research centers and innovative start-ups and is in a leading position in sectors such as robotics, service sectors, automotive, healthcare and computing infrastructure.

[*] I acknowledge the support of the European Commission through the European "Erasmus + Program", although all the opinions expressed in this chapter are personal. I warmly thank Thomas Streinz for his insightful comments on my preliminary draft. All mistakes that possibly remain in this final version are obviously mine.

[1] For a comprehensive study on the trade impact of the fourth industrial revolution, see M Rentzhog, "The Fourth Industrial Revolution: Changing Trade as We Know It" (*WITA*, 18 October 2019), https://perma.cc/5NLX-L7VA. See also the chapters by Aik Hoe Lim (Chapter 5) and Lisa Toohey (Chapter 17) in this volume.

[2] Overall, some 3.2 billion euros were invested in AI in Europe in 2016, compared with 12.1 billion in North America and 6.5 billion in Asia. European Commission, "White Paper on Artificial Intelligence: A European Approach to Excellence and Trust", 2020 (hereinafter White Paper on AI).

[3] In this chapter, I will refer to "Europe" to describe the European Union and its member states.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

Perhaps more importantly, there is growing awareness in Europe that competition and the technological race for AI will be a matter of great significance for the future of the old continent's economy, its recovery after the COVID-19 pandemic and, broadly speaking, the strategic autonomy of the EU and its member states.

The 2020 European Commission White Paper on Artificial Intelligence illustrates a form of European awakening.[4] This strategic document insists on the necessity of better supporting AI research and innovation in order to strengthen European competitiveness. According to the Commission, Europe should particularly seize the opportunity of the "next data wave" to better position itself in the data-agile economy and become a world leader in AI.[5] The Commission makes a plea for a balanced combination of the economic dimension of AI and a values-based approach as the development of AI-related technologies and applications raises new ethical and legal questions.[6]

Profiling[7] and automated decision-making[8] are used in a wide range of sectors, including advertising, marketing, banking, finance, insurance and healthcare. Those processes are increasingly based on AI-related technologies, and the capabilities of big data analytics and machine learning.[9] They have enormous economic potential. However, services such as books, video games, music or newsfeeds might reduce consumer choice and produce inaccurate predictions.[10] An even more serious criticism is that they also can perpetuate stereotypes and discrimination bias.[11] Studies on this crucial issue are still rare because of a lack of access, as researchers often cannot access the proprietary algorithm.[12] In several European countries, including France, the opacity of algorithms used by the administration has become a political issue and has also provoked growing case law[13] and legislative changes.[14] Finally, as the European Commission recently observed, AI increases the possibility to track and

[4] See AI for Europe, COM(2018) 237 final, Brussels, 25.4.2018; and White Paper on AI, note 2 above, at 4. See also "Mission Letter: Commissioner-Designate for Internal Market" (2019), https://perma.cc/U7EW-C3MC.

[5] European Commission, AI White Paper, note 2 above; see also J Manyika, "10 Imperatives for Europe in the Age of AI and Automation" (2017), https://perma.cc/R5MP-DT82.

[6] FZ Borgesius, "Discrimination, Artificial Intelligence, and Algorithmic Decision Making" (2018), https://perma.cc/SHC7-WD5H.

[7] GDPR, Article 4(4).

[8] GDPR, Articles 15 and 22.

[9] 'Guidelines on Automated individual decision-making and profiling for the purpose of Regulation 2016/679, European Commission', October 2017.

[10] Ibid.

[11] See Z Obermeyer et al., "Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations" (2019) 336 *Science* 447.

[12] H. Ledford, *Nature* 574 (2019), 608–609.

[13] See, for instance, the ruling of the French constitutional court n° 2018–765 DC, "Loi relative à la protection des données personnelles", 12 June 2018. See also the Décret (executive order) n° 2017–330 du 14 mars 2017 "relatif aux droits des personnes faisant l'objet de décisions individuelles prises sur le fondement d'un traitement algorithmique", JO n° 64, 16 March 2017.

[14] One of the most controversial issues was the opacity of the algorithm used for the selection process at the public university. See C Villani and G Longuet, "Les algorithmes au service de l'action publique:

analyze people's habits. For example, there is the potential risk that AI may be used for mass state surveillance and also by employers to observe how their employees behave. By analyzing large amounts of data and identifying links among them, AI may also be used to retrace and deanonymize data about persons, creating new personal data protection risks.[15]

To summarize, the official European stance regarding AI combines a regulatory and an investment-oriented approach, with a twin objective of promoting AI and addressing the possible risks associated with this disruptive technology. This is indeed crucial as the public acceptance of AI in Europe is reliant on the conviction that it may benefit not only companies and decision-makers but also society as a whole. However, so far, especially when it comes to the data economy on which AI is largely based, public intervention in Europe has occurred through laws and regulations that are based on noneconomic considerations. The General Data Protection Regulation (GDPR)[16] is essential in this respect because it reflects how a human rights-based legal instrument might interfere with data-based economic principles. This 2016 regulation aims at enforcing a high standard of personal data protection that can limit the free flow of data, which is at the heart of the development of AI technologies.

Given the worldwide economic importance of the single market, the effects of this regulation are inevitably global. Many commentators rightly emphasized the extraterritorial effect of this European regulation, as a non-European company wishing to have access to the European market has no choice but to comply with the GDPR.[17] Moreover, the most recent generation of EU free trade agreements (FTAs) contains chapters on e-commerce and digital trade, under which the parties reaffirm the right to regulate domestically in order to achieve legitimate policy objectives, such as "public morals, social or consumer protection, [and] privacy and data protection". Under the latest EU proposals, the parties would recognize cross-border data flows, but they would also be able to "adopt and maintain the safeguards [they] deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data".[18]

The next section will present the growing debate on data protectionism (Section II). I will then study the EU's approach toward data protection and assess whether the set of internal and international legal provisions promoted by the EU effectively

le cas du portail admission post-bac–Rapport au nom de l'office parlementaire d'évaluation des choix scientifiques et technologiques" (2018), https://perma.cc/U9R4-ZT67.

[15] See White Paper on AI, note 2 above, at 12.

[16] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, 1–88.

[17] GDPR, Article 83.

[18] See "EU Proposal on Digital Trade for the EU-Australia FTA" (2018), https://perma.cc/2KQ8-F9HF.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

translates into a meaningful balance between trade, innovation and ethical values (Section III). I will also describe the birth of European trade diplomacy in the field of digital trade, focusing the analysis on the most recent EU FTAs' provisions and proposals. I will compare them with recent US-led trade agreements, such as the Trans-Pacific Partnership (TPP) and the United States-Mexico-Canada Agreement (USMCA), to assess whether the EU's approach constitutes a model for future plurilateral or multilateral trade agreements (Section IV). In conclusion, I will assess whether the American and European approaches are reconcilable or destined to diverge given the opposing political and economic interests they translate.

II DATA PROTECTION OR DATA PROTECTIONISM?

Data has often been described as a contemporary raw material, a sort of postindustrial oil, and its free flow as the necessary condition for the convergence between globalization and digitalization. Data is at the heart of the functioning of AI, which is in turn the most important application of a data economy. The development of AI relies on the availability of data, and its value increases with detailed and precise information, including private information.[19] The availability and enhancement of data are crucial for the development of technologies, such as machine learning and deep learning, and offer a decisive competitive edge to companies involved in the global competition for AI.[20] Moreover, access to data is an absolute necessity for the emergence and development of a national and autonomous AI industry.[21] Not surprisingly, given the growing economic and political importance of data, governments and policy-makers are increasingly trying to assert control over global data flows. This makes sense as data, and in particular private data, is more and more presented as a highly political issue that has for too long been ignored in the public debate.[22]

The current move toward digital globalization could be threatened by three types of policies: new protectionist barriers, divergent standards surrounding data privacy and requirements on data localization.[23] Data localization has also been

[19] Scholars have tried to compartmentalize data into different categories such as personal data, public data, company data, business data, etc. In practice, however, it appears to be difficult to apply different legal instruments based on the nature of the data. Cross-border data transfers mostly cover personal data, which has both a private value and an economic value. See N Mishra, "Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows" (2019) 52 *Vanderbilt Journal of Transnational Law* 463, at 472–473; and S. Yakovleva, "Should Fundamental Rights to Privacy and Data Protection Be a Part of the EU's International Trade 'Deals'?" (2018) 17 *World Trade Review* 477.

[20] C. Villani et al., "Donner Un Sens à l'Intelligence Artificielle. Pour Une Stratégie National et Européenne" (2018), https://perma.cc/SLC9-AMNZ.

[21] European Commission, White Paper on AI, note 2 above, at 3.

[22] See S. Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization" (2015) 30 *Journal of Information Technology* 75.

[23] See J Manyika et al., "Digital Globalization: The New Era of Global Flows" (2016), https://perma.cc/3XCW-4U86.

depicted as "data protectionism" and a new form of nationalism,[24] or even anti-Americanism,[25] whereas others have advocated for a "digital sovereignty" that would imply the state's power to regulate, limit or even prohibit the free flow of data.[26] Many countries are indeed subject to internal tensions between supporters of data openness as a catalyst for trade and technological development and those who promote comprehensive data protection in order to defend digital sovereignty as a prerequisite of national sovereignty. Old concepts and notions of international law, such as (digital) self-determination, (data) colonization, reterritorialization of data and (digital) emancipation, are also mobilized when it comes to justifying states' "right to regulate" data. However, those general concepts often appear inadequate given the intrinsic nature of data flows and Internet protocol, which tend to blur the distinction between the global and the local. Data flows somehow render obsolete the traditional considerations of geographical boundaries and cross-border control that characterize classical international law.[27]

Neha Mishra has thoroughly described different types of data-restrictive measures. State control can intervene using the physical infrastructures through which Internet traffic is exchanged, a local routing requirement and a variety of cross-border data flow restrictions, such as data localization measures or conditional restrictions imposed on the recipient country or the controller/processor.[28] Primary policy goals may justify those restrictions on the grounds of public order and moral or cultural issues. In Europe, the rationale behind the restrictions on the cross-border of data transfer and AI has been primarily addressed through the angle of data protection – that is, the defense and protection of privacy – as one of the most fundamental human rights.

This narrative extends well beyond the sole economic protection of European interests and has the enormous advantage of conciliating protectionist and nonprotectionist voices in Europe. It contrasts and conflicts with an American narrative based on freedom and technological progress, where free data flows are a prerequisite for an open and nondiscriminatory digitalized economy.

[24] A Chander and UP Lê, "Data Nationalism" (2015) 64 *Emory Law Journal* 677.

[25] See "The Rise of Digital Protectionism" (Council on Foreign Relations, 18 October 2017), https://perma.cc/P4H2-7BFV</int_i. The participants in this workshop considered that Chinese measures on data localization reflected China's "authoritarian" and "mercantilist" model, whereas "Europe's digital protectionism" is described as "in line with Brussels' legalistic, top-down, heavily regulated approach to economic policy".

[26] This claim for sovereignty is in reality as old as the existence of a public debate on data flows. See C Kuner, "Data Nationalism and Its Discontent" (2015) 64 *Emory Law Journal* 2089. See also S Aaronson, "Why Trade Agreements Are Not Setting Information Free: The Lost History and Reinvigorated Debate Over Cross-Border Data Flows, Human Rights and National Security" (2015) 14(4) *World Trade Law Review* 671.

[27] See Mishra, note 19 above, at 473.

[28] Ibid., at 474–477.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

III THE EUROPEAN LEGAL DATA ECOSYSTEM AND ITS IMPACTS ON ARTIFICIAL INTELLIGENCE AND INTERNATIONAL DATA FLOWS

The European Legal Framework on data, and in particular on data protection, is nothing new in the EU. It can be explained in the first place by internal European factors. European member states started to adopt their own law on the protection of personal information decades ago,[29] on the grounds of the protection of fundamental rights, and in particular the right to privacy, protected under their national Constitution, the European Convention on Human Rights and the European Charter of Human Rights, which forms part of current primary EU law. Therefore, EU institutions recognized early the need to harmonize their legislation in order to combine the unity of the single market and human rights considerations already reflected in member states' legislation. It explains why, while some international standards, namely those of the Organisation for Economic Co-operation and Development (OECD)[30] and Asia-Pacific Economic Cooperation (APEC),[31] emphasize the economic component of personal data, the EU's legal protection has been adopted and developed under a human rights-based approach toward personal data.[32]

The 1995 European Directive was the first attempt to harmonize the protection of fundamental rights and freedoms of natural persons with respect to processing activities, and to ensure the free flow of data between member states.[33] However, a growing risk of fragmentation in the implementation of data protection across the EU and legal uncertainty justified the adoption of a new instrument that took the form of a Regulation, which is supposed to provide stronger uniformity in terms of application within the twenty-seven member states.[34]

The GDPR also represents a regulatory response to a geopolitical challenge initiated by the United States and its digital economies to the rest of the world. From a political perspective, the Snowden case and the revelation of the massive surveillance organized by American agencies provoked a strong reaction among European public opinion, including within countries that had recently experimented with authoritarian regimes (such as the former East Germany and

[29] For instance, the French legislation "informatique et liberté" was adopted in January 1978. See Loi n° 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

[30] See "The OECD Privacy Framework" (2013), https://perma.cc/BC7W-B6VW, and also its explanatory Memorandum.

[31] See "APEC Privacy Framework" (2015), https://perma.cc/VBW5-4ZCL.

[32] Yakovleva, note 19 above.

[33] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995 (hereinafter Data Protection Directive).

[34] Despite this general assumption, one can observe that the GDPR leaves in practice some discretion to national authorities, in particular when it comes to the procedural enforcement of the substantive rights granted under this regulation.

Poland).[35] The Facebook-Cambridge Analytica scandal further demonstrated that the freedom of millions of Europeans and their democracies was at stake and could be threatened by the digital hegemony of American tech companies with commercial interests. The demand for data protection against free and uncontrolled flows of data has also been encouraged by the progressive awareness of the economic and technological consequences of free data flows, as European companies appeared to be increasingly outpaced by their American rivals, especially in the field of AI. In parallel, in a spectacular ruling in 2015, the European Court of Justice annulled a decision of the European Commission, under which the United States was until then considered to be providing a sufficient level of protection for personal data transferred to US territory (under the so-called safe harbor agreement).[36]

The GDPR has been both praised and criticized, within and outside of Europe. Still, it remains to a certain extent a legal revolution in the field of data regulation, not so much because of its content – it is not, after all, the first legal framework to deal with algorithms and data processing – but more because of the political message this legislation sends to the European public and the rest of the world.[37] Through the adoption of this Regulation in 2016, the EU has chosen to promote high standards for data protection. Every single European and non-European company that is willing to process European data, including those developing AI, must comply with the GDPR.[38]

A *European Data Protection's Regulation and Artificial Intelligence*

The GDPR regulates the processing of personal data; that is, any information relating to a directly or indirectly identified or identifiable natural person ("data subjects"). This legislation deals with AI on many levels.[39] First, it contains a very broad definition of "processing" as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means".[40]

[35] The Commission proposed the first version of the future GDPR in January 2012. The discussion progressed very slowly until 2014 and the revelations of Edward Snowden in 2014. The GDPR was finally adopted in April 2016.

[36] ECJ, 6 October 2015, Judgment in Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

[37] Even though Europe is not the sole region that adopted a data privacy legislation, according to the United Nations Conference on Trade and Development (UNCTAD), 66 percent of countries worldwide have a data protection law. See "Data Protection and Privacy Legislation Worldwide" (2020), https://perma.cc/BCP3-C2BA.

[38] Compare GDPR Article 3(2).

[39] For a comprehensive review of the GDPR, see PM Schwartz, "Global Data Privacy: The EU Way" (2019) 94 *NYU Law Review* 771.

[40] GDPR, Article 4(4).

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It also regulates the conditions under which "personal data"[41] can be collected, retained, processed and used by AI. The GDPR is built around the concept of lawful processing of data,[42] meaning that personal data *cannot* be processed without obtaining individual consent or without entering into a set of limited categories defined under the Regulation.[43] That is a crucial difference between current American federal and state laws, which are based on the presumption that data processing is lawful unless it is explicitly prohibited by the authorities under specific legislation.[44]

Under the GDPR, processing of personal data is subject to the lawfulness, fairness and transparency principles.[45] The Regulation also contains specific transparency requirements surrounding the use of automated decision-making, namely the obligation to inform about the existence of such decisions, and to provide meaningful information and explain its significance and the envisaged consequences of the processing to individuals.[46] The right to obtain information also covers the rationale of the algorithms, therefore limiting their opacity.[47] Individuals have the right to object to automated individual decision-making, including the use of data for marketing purposes.[48] The data subject has the right to not be subject to a decision based solely on automated decision-making when it produces legal effects that can significantly affect individuals.[49] Consent to the transfer of data is also carefully and strictly defined by the Regulation, which states that it should be given by a clear affirmative act from the natural person and establishes the principles of responsibility and liability of the controller and the processor for any processing of personal data.[50] Stringent forms of consent are required under certain specific circumstances, such as automated decision-making, where explicit consent is needed.[51]

Therefore, under the GDPR, a controller that will use data collected for profiling one of its clients and identifying its behavior (for instance, in the sector of insurance)

[41] The GDPR only deals with personal data. Nonpersonal data is addressed by Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of nonpersonal data in the European Union, OJ L 303, 28.11.2018, at 59–68.

[42] GDPR, Article 6.

[43] Compare GDPR, Article 6(1).

[44] A Chander et al., "Catalyzing Privacy Law" (2019), https://scholarship.law.georgetown.edu/facpub/2190.

[45] GDPR, Article 5(1)(a).

[46] GDPR, Article 13.2.

[47] GDPR, Article 15.1. The contours of this right are, however, controversial. Some authors argue it amounts to a right to explanation. See AD Selbst and J Powles, "Meaningful Information and the Right to Explanation" (2017) 7(4) *International Data Privacy Law*, at 233.

[48] GDPR, Article 21.

[49] GDPR, Article 22. Exceptions remain, for instance, if they are entering into a contract based on the data subject's explicit consent, or if they are authorized under the member states' laws. Article 22(2)(c) GDPR.

[50] GDPR, Article 24.

[51] GDPR, Article 22(1)(c). This is also supported by recital 71 of the GDPR.

must ensure that this type of processing relies on a lawful basis. Moreover, the controller must provide the data subject with information about the data collected. Finally, the data subject may object to the legitimacy of the profiling.

Another illustration of the interference between AI technologies and GDPR is the requirements and limitations imposed on the use of biometric data[52] for remote identification, for instance through facial recognition. The GDPR prohibits the process of biometric data "for the purpose of uniquely identifying a natural person" unless the data subject has given explicit consent.[53] Other limitations to this prohibition are exhaustively delineated, such as the "protection of the vital interests" of the data subject or other natural persons, or for reasons of "substantial public interest". Most of those limited biometric identification purposes will have to be fulfilled according to a necessity and a proportionality test and are subject to judicial law review.[54]

B *Transatlantic Regulatory Competition*

Despite its limitations and imperfections, the GDPR remains as a piece of legislation that aims to rightfully balance fundamental rights considerations with technological, economic and policy considerations in accordance with European values and standards. In contrast, US law surrounding the data privacy legal framework does not rely on human rights but, rather, on consumer protection, where the individual is supposed to benefit from a bargain with the business in exchange for its personal information (the so-called transactional approach).[55] Moreover, in contrast with Europe's unified and largely centralized legislation, the American model for data protection has primarily been based on autoregulation and a sectoral regulation approach, at least until the 2018 adoption of the California Consumer Privacy Act (CCPA).[56]

This state legislation partially resembles the GDPR. First, the CCPA is the first data protection statute that is not narrowly sectoral.[57] It defines "personal information" in a way that seems in practice equivalent to the GDPR's personal data definition.[58] Personal information is also partially relevant to AI (such as biometric data, geolocalization and Internet, or other electronic network information). It also includes a broad definition of processing, which can include automated decision-

[52] Compare the definition of biometric data in GDPR, Article 4 (14).
[53] GDPR, Article 9.1.
[54] GDPR, Article 9.2.
[55] See Chander et al., note 44 above, at 13.
[56] The CCPA entered into force in January 2020. SB-1121 California Consumer Privacy Act of 2018 (hereinafter CCPA).
[57] However, at the federal level, sensitive data that are considered noncommercial also benefit from strong protection. That is the case, in particular, for data collected by hospitals or the banking sector. See, for instance, the Health Insurance Portability and Accountability Act, 45 C.F.R. § Parts 160, 162 and 164.
[58] See CCPA SEC.9 (o).

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making.[59] Echoing the GDPR's transparency requirements, the CCPA provides a right of information, under which a consumer has the right to request that a business that collects consumers' personal information disclose to that consumer the categories and specific pieces of personal information collected.[60] This right of disclosure is particularly significant.[61] The CCPA also contains a right to opt out and deny the possibility for a business to use its personal information.[62]

Despite those similarities, important differences remain between the two statutes. Concretely, under the CCPA's transactional approach, the right to opt out cannot be opposed if it is necessary to business or service providers to complete the transaction for which the personal information was collected or to enable solely internal uses that are reasonably aligned with the expectations of the consumer's relationship with the business.[63] Moreover, whereas the GDPR rests on the principle of the "lawful processing of data",[64] the CCPA does not require processing to be lawful, implying that data collection, use and disclosure is allowed unless it is explicitly forbidden. Whereas the GDPR requires some specific forms of consent related to sensitive data and limits individual automated decision-making, the CCPA "does nothing to enable individuals to refuse to give companies their data in the first place".[65] Another striking difference is related to the consumer's right not to be discriminated against under the CCPA if he or she decides to exercise the right to seek information or the right to opt out. The effect of this nondiscrimination principle seems tenuous as, in those circumstances, a business is not prohibited from charging a consumer a different price or rate, or from providing a different level or quality of goods or services to the consumer.[66] This is typically the result of a consumer protection-based approach, which in reality tolerates and admits discrimination (here, the price or the quality of the service provided), and a human rights-based approach that is much more reluctant to admit economic differentiations among individuals to whom those fundamental rights are addressed.

This brief comparison between the GDPR and the CCPA is not meant to suggest that one legislative model is intrinsically superior, more efficient, more legitimate or more progressive than the other. Both statutes merely translate ontological discrepancies between the European and American legal conceptions and policy choices. However, the conflict between those two models is inevitable when considering the current state of cross-border data flows. Not surprisingly, the question of extraterritoriality was crucial during the GDPR's drafting.[67] Even though the Regulation is based on the necessity of establishing a single digital market, under which data

59 See CCPA SEC.9 (q).
60 CCPA SEC.1A. See further Chander et al., note 44 above, at 14–16.
61 CCPA SEC.3 (a).
62 CCPA SEC.2 (a).
63 CCPA SEC.2 (d). Compare GDPR Article 22(2)(a).
64 GDPR Article 6(1). Chander et al., note 44 above, at 19.
65 Ibid., at 20.
66 CCPA SEC.6 (a)(2).
67 See in particular D. Bernet's insightful documentary *Democracy: Im Rausch der Daten* (2015).

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protection and fundamental EU rights are equally guaranteed, its extraterritorial effects are expressly recognized as the GDPR applies "in the context of the activities of an establishment of a controller or a processor in the Union, *regardless of whether the processing takes place in the Union or not*" and "to the processing of personal data subjects who are in the Union by a controller or processor *not established in the Union*".[68] The extraterritorial effects of the GDPR and, more broadly, of the EU's legal framework are undeniable given the importance of the single EU market.[69] Extraterritoriality should be understood as a kind of "effet utile" of the Regulation, as most of the data processors and controllers are currently located outside the EU's territory. The EU's effort would in practice be doomed if personal data protection were to be limited to the EU borders.[70]

The European legislator admits that flows of personal data to and from countries outside the EU are necessary for the expansion of international trade.[71] Yet, international data transfers must not undermine the level of data protection and are consequently subject to the Regulation's provisions. Data transfer to third countries is expressly prohibited under the GDPR unless it is expressly authorized thanks to one of the legal bases established under the Regulation.[72] The European Commission may decide under the GDPR that a third country offers an adequate level of data protection and allow transfers of personal data to that third country without the need to obtain specific authorization.[73] However, such a decision can also be revoked.[74] In the absence of an adequacy decision, the transfer may be authorized when it is accompanied by "appropriate safeguards", which can take the form of binding corporate rules[75] or a contract between the exporter and the importer of the data, containing standard protection clauses adopted by the European Commission.[76] Even in the absence of an adequacy decision or appropriate safeguards, data transfer to third countries is allowed under the GDPR, in particular on the consent of the data subject, and if the transfer is necessary for the performance of a contract.[77]

[68] GDPR, Article 3.

[69] See A Bradford, *The Brussels Effect: How the European Union Rules the World* (New York, Oxford University Press, 2020). For a distinction between the so-called Delaware Effect, California Effect and Brussels Effect, see Chander et al., note 44 above.

[70] Schwartz, note 39 above, at 11. For a discussion of the GDPR's limits see ECJ, 24 September 2018, Judgment in Case C-507/17, *Google LLC, v. Commission nationale de l'informatique et des libertés (CNIL)*, ECLI:EU:C:2019:772.

[71] GDPR, Recital 201.

[72] GDPR, Article 44.

[73] This adequacy requirement of the data protection level in the foreign jurisdiction was already in place in the Data Protection Directive, note 33 above. Before its adoption, member states had their own adequacy requirements. Schwartz, note 39 above, at 11–12.

[74] GDPR, Articles 44 and 45.

[75] Defined as internal corporate rules for data transfers within multinational organizations.

[76] GDPR Articles 46 and 47.

[77] GDPR Article 49.

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Under the current regime, the EU Commission adopted a set of adequacy findings with select third countries, such as Japan, in February 2019.[78] The European Commission also commenced adequacy negotiations with Latin American countries (Chile and Brazil) and Asiatic countries (Korea, India, Indonesia, Taiwan), as well as the European Eastern and Southern neighborhoods, and is actively promoting the creation of national instruments similar to the GDPR.[79] Moreover, in July 2016, the European Commission found that the EU-US Privacy Shield ensures an adequate level of protection for personal data that has been transferred from the EU to organizations in the USA, demonstrating regard for, inter alia, safeguards surrounding access to the transferred data by the United States' intelligence services.[80] More than 5,300 companies have been certified by the US Department of Commerce in charge of monitoring compliance with a set of common data privacy principles under the Privacy Shield, which is annually and publicly reviewed by the Commission.[81] The Privacy Shield seemed to demonstrate that despite profound divergence between European and American approaches to data protection, there was still room for transatlantic cooperation and mutual recognition. However, in mid-July 2020, the European Court of Justice (ECJ) concluded that the Commission's Privacy Shield decision was invalid as it disregarded European fundamental rights.[82] As the Court recalled, the Commission must only authorize the transfer of personal data to a third country if it provides "a level of protection of fundamental rights and freedoms essentially equivalent to that guaranteed within the European".[83] The ECJ found lacunae in judicial protections for European data subjects against several US intelligence programs.[84]

The question of data transfer between the EU and UK after Brexit is one of the many hot topics that should be dealt with in a future EU/UK trade agreement, and it is a perfect example of the problematic nature of the GDPR's application to EU third countries with closed economic ties. The October 2019 political declaration setting out the framework for the future relationship between the two parties contains a specific paragraph on digital trade that addresses the question of data

[78] The European adequacy decision came after Japanese internal reforms on data privacy law, in particular the extensive 2015 amendment to Japan's Act on the Protection of Personal Information (APPI). See Schwartz, note 39 above, at 14–16. See the Commission Implementing Decision (EU) 2019/419 of 23 January 2019, OJ L 76, 19.3.2019. This decision scrutinizes the Japanese legal framework concerning data protection.

[79] Data protection rules as a trust-enabler in the EU and beyond – taking stock, COM(2019) 374 final, July 2019. See also the list of adequacy decisions at https://perma.cc/VA6X-ZQ3T.

[80] The Privacy Shield had to be negotiated after the European Court of Justice found that a former EU-US safe harbor arrangement was incompatible with EU law. See *Maximillian Schrems v. Data Protection Commissioner*, note 35 above.

[81] "Privacy Shield Framework", https://perma.cc/RTZ2-UAT5.

[82] Case C-311/18, *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems*, 16.07.2020.

[83] Ibid., at part 94.

[84] The adequacy decision being annulled, future data transfer will, however, remain possible under GDPR Article 49.

protection. It says that future provisions on digital trade "should . . . facilitate cross-border data flows and address unjustified data localisation requirements, noting that this facilitation will not affect the Parties' personal data protection rules".[85] However, in June 2020, six months after Brexit, the Commission was still uncertain regarding a future UK adequacy assessment because of a lack of specific data protection commitment in the UK. Moreover, the British government indicated that it wanted to develop a separate and independent data protection policy.[86] One of the EU's main concerns is that through bilateral agreements concluded between the UK and the USA, data belonging to EU citizens could be "siphoned off" to the United States.[87]

The issue of compatibility between European privacy rules and the Chinese legal framework is also a growing matter of concern for Europeans. China applies much stricter data border control on the grounds of national security interests. For instance, the 2017 Chinese law on cybersecurity provides that companies dealing with critical infrastructures of information, such as communications services, transport, water, finances, public services energy and others, have an obligation to store their data in the Chinese territory. Such a broad definition can potentially affect all companies, depending on the will of Chinese authorities, who also have broad access to personal information content on the grounds of national security.[88] However, Chinese attitudes regarding privacy protection are not monolithic. According to Samm Sacks, "[t]here is a tug of war within China between those advocating for greater data privacy protections and those pushing for the development of fields like AI and big data, with no accompanying limits on how data is used". This expert even describes a growing convergence between the European and Chinese approaches in data protection regimes, leading the USA to be more isolated and American companies to be more reactive.[89] However, based on the model of the recent conflict between European data privacy rules and US tech companies' practices, emerging cases that shed new light on data protection regulatory divergence between China and the EU are inevitable.[90]

Fragmentation and market barriers are emerging around requirements for privacy and data flows across borders. Can this fragmentation be limited through international

[85] See "Revised Political Declaration Setting Out Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom as Agreed at Negotiators' Level" (17 October 2019), https://perma.cc/5Y4S-XBQU.

[86] See Boris Johnson's Government written statement on the UK/EU relationship made on 3 February 2020.

[87] See, for instance, the Access to Electronic Data for the Purpose of Countering Serious Crime Agreement signed between the UK and the USA in October 2019.

[88] S Livingstone, "China Sets to Expand Data Localization and Security Services Requirements" (IAPP, 25 April 2017), https://perma.cc/3R5N-CL4A.

[89] See S Sacks, "New China Data Privacy Standard Looks More Far-Reaching Than GDPR" (Center for Strategic and International Studies, 29 January 2018), https://perma.cc/A6AH-8EYX.

[90] See German Labour Court ruling concerning Huawei, "Arbeitsgericht Düsseldorf, 9 Ca 6557/18" (Justiz-Online, 5 March 2020), https://perma.cc/9FEV-2TGX.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

trade law? What is the EU's position on international data flows and data protection in the context of its trade policy? Can and should European trade agreements become an efficient way to promote the GDPR's privacy approach?

IV THE BIRTH OF EUROPEAN DIGITAL TRADE DIPLOMACY

Not surprisingly, given its imprecise nature, AI is not covered as such by trade agreements, although AI technologies that combine data, algorithms and computing power can be affected by trade commitments in the field of goods and services. In this section, I will focus on the issue of the trade dimension of cross-border data flows, given its strategic relevance to AI applications. Although data cannot be assimilated to traditional goods or services, trade rules matter with regard to data in multiple ways.[91] As I have already noted, even though regulating data flows on national boundaries might seem counterintuitive and inefficient,[92] states and public authorities are tempted to regain or maintain control of data flows for many reasons, ranging from national security to data protection to economic protectionism. A trade agreement is one international public law instrument that might constitute a legal basis to promote cross-border data control or, on the contrary, the free flow of data principle.

A *A Limited Multilateral Framework*

Despite recent developments, digital trade rules currently remain limited, both at the multilateral and the bilateral level. World Trade Organization (WTO) disciplines do not directly confront the problematic nature of digital trade or AI, even though the WTO officially recognizes that AI, together with blockchain and the Internet of Things, is one of the new disruptive technologies that could have a major impact on trade costs and international trade.[93] Mira Burri has, however, described how WTO general nondiscrimination principles – Most Favorable Nation Treatment and National Treatment – could potentially have an impact on the members' rules and practices regarding digital trade, as well as more specific WTO agreements, especially the General Agreement on Trade in Services (GATS).[94] She notes that WTO members have made far-reaching commitments under the GATS. The EU in particular has committed to data processing services,

[91] See Mishra, note 19 above; M Burri, "The Regulation of Data Flows Through Trade Agreements" (2017) 51 *UC Davis Law Review* 407, at 468.

[92] Mishra, note 19 above.

[93] See World Trade Organization, "World Trade Report 2018: The Future of World Trade – How Digital Technologies Are Transforming Global Commerce" (2018), https://perma.cc/S9AM-A26P; D Mitchell and N Mishra, "Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute" (2019) 22(3) *Journal of International Economic Law* 389.

[94] M Burri, "The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation" (2017) 51 *UC Davis Law Review* 65.

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database services and other computing services.[95] These commitments might prohibit new measures with regard to search engines that limit market access or discriminate against foreign companies, as they should be considered data processing services. Localization requirements with regard to computer and related services would also be prima facie GATS-inconsistent, but could well be justified under the agreement's general exceptions.[96]

Despite a few updates, such as the Information Technology Agreement, WTO members have failed, as in other fields, to renovate and adapt proper WTO disciplines to strategic issues, such as digital trade and AI. The current plurilateral negotiations on e-commerce, which involve seventy-nine members including China, Japan, the USA and the EU and its member states, might represent a new opportunity to address these issues.[97] However, given the current state of the WTO, such evolution remains, at present, hazardous.[98] So far, the most relevant provisions on digital trade are those negotiated within the bilateral or plurilateral trade deals, beginning with the TPP.[99]

Recent developments in EU digital trade diplomacy can be seen as a reaction to the United States' willingness to develop an offensive normative strategy whose basic aim is to serve its big tech companies' economic interests and to limit cross-border restrictions based on data privacy protection as much as possible.

B *The US Approach to Digital Trade Diplomacy*

The United States' free trade agreement (FTA) provisions on digital trade are the result of the Digital Agenda that was endorsed in the early 2000s. Several US trade agreements containing provisions on e-commerce have been concluded by different American administrations over the last two decades.[100] In 2015, the United States Trade Representative described the TPP as "the most ambitious and visionary

[95] Ibid., at 84.

[96] Ibid. See also the way the WTO Appellate Body interpreted GATS article XIV in *US – Gambling* (WT/DS285/ABR, 7 April 2005).

[97] See the WTO Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019. See also Henry Gao's Chapter 15 in this volume.

[98] It can even be traced back to the Clinton administration's framework for global electronic commerce. See T Streinz, "Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy," in B Kingsbury et al. (eds), *Megaregulation Contested Global Economic Ordering After TPP* (Oxford, Oxford University Press, 2019).

[99] Ibid.

[100] See the FTAs concluded with Australia (2002), Singapore (2003), Bahrain (2004), Chile (2004), the central American countries (2004), Morocco (2006), Oman (2009), Peru (2009), Panama (2012), Colombia (2012) and especially Korea (2012), which was, until the TPP, the most advanced FTA on digital trade. See S Wunsch-Vincent and A Hold, "Toward Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Agreements", in M Burri and T Cottier (eds), *Trade Governance in the Digital Age* (Cambridge, Cambridge University Press, 2011).

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

internet agreement ever attempted".[101] The TPP provisions relate to digital trade[102] in various respects, including, inter alia, nondiscriminatory treatment of digital products,[103] a specific ban of custom duties on electronic transmission[104] and free supply of cross-border digital services.[105] More specifically, despite recognizing the rights of the parties to develop their own regulatory requirements concerning the transfer of information by electronic means, the agreement prohibits the limitation of cross-border transfer of information by electronic means, including personal information.[106] Additionally, under the TPP, "no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory".[107] US tech companies were deeply satisfied with the content of the agreement.[108]

However, the TPP drafters did not ignore the problematic nature of personal information protections. Indeed, the text of this agreement recognized the economic and social benefits of protecting the personal information of users of electronic commerce.[109] It even indicated that each party *shall* adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce, therefore admitting the possibility of following different legal approaches. However, each party should adopt instruments to promote compatibility between the different legal frameworks,[110] and the agreement's wording is relatively strong on the nondiscriminatory practices in terms of user protections.

The GDPR was still under discussion when the TPP was concluded. However, there is room for debate concerning the possible compatibility of the European legislation and this US trade treaty. As with the WTO compatibility test, the main issue concerns the possible discriminatory nature of the GDPR, which in practice is arguable. This doubt certainly constituted an incentive for the EU to elaborate upon and promote its own template on digital trade, in order to ensure that its new

[101] The Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114–26 sec. 102 (b)(6) adopted by the US Congress included precise negotiations objectives for digital trade in goods and services and cross-border data flows.

[102] See TPP chapter 14 on "Electronic Commerce".

[103] TPP, Article 14.4.

[104] TPP, Article 14.3.

[105] Cross-border service provisions of US FTAs have always been very liberal as they rely on a negative approach, meaning that a cross-border service should be liberalized unless the contracting parties expressly restrict it. See TPP, Article 14.2.4.

[106] TPP, Article 14.11.2.

[107] TPP, Article 14.13. However, such a provision is subject to limitations on the grounds of legitimate public policy objectives, provided that they are not applied in a discriminatory and disproportionate manner. TPP, Article 14.8.

[108] See "IBM Comments on U.S. Review of Trade Agreements" (THINKPolicy Blog, 31 July 2017), https://perma.cc/4GGR-YZVC.

[109] TPP, Article 14.8.1.

[110] Both autonomous instruments and mutually agreed-upon solutions are permitted, which seems to echo the GDPR mechanisms described.

legislation wouldn't be legally challenged by its trade partners, including the US administration.

Just like the TPP, the USMCA contains several provisions that address digital trade, including a specific chapter on this issue.[111] It also prohibits custom duties in connection with digital products[112] and protects source code.[113] The prohibition of any cross-border transfer or information restriction is subject to strong wording, as the agreement explicitly provides that "[n]o Party *shall* prohibit or restrict the cross border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person".[114] Yet, the USMCA admits the economic and social benefits of protecting the personal information of users of digital trade and the relevance of an internal legal framework for the protection of this information.[115] However, the conventional compatibility of internal regulations that would limit data collection relies on a necessity and proportionality test and a nondiscrimination requirement. In any case, the burden of proving compatibility will undoubtedly fall on the party that limited data transfer in the first place, even though it did so on the grounds of legitimate policy objectives. Under these circumstances, the legality of GDPR-style legislation would probably be even harder to argue than under the former TPP.

C *The European Union's Response to the American Trade Regulatory Challenge*

Before studying the precise content of existing EU agreements and proposals on digital trade, one should bear in mind that European trade policy is currently subject to strong internal tensions. Trade topics have become increasingly politicized in recent years, especially in the context of the Comprehensive Economic and Trade Agreement (CETA) and Transatlantic Trade and Investment Partnership (TTIP) negotiations. It is not only member states, through the Council, and the European Parliament – which has obtained, after the Lisbon Treaty, the power to conclude trade agreements together with the Council – that have placed pressure on the Commission. Pressure has also come from European civil society, with movements organized at the state and the EU level.[116] As a result, the idea that trade deals should no longer be a topic for specialists and be subject to close political scrutiny is gaining ground in Europe. As a response, the capacity of trade agreements to better regulate international trade is now part of the current Commission's narrative to advocate for

[111] The name of the USMCA chapter is now "digital trade", which may sound more precise than the TPP's "electronic commerce" language.
[112] USMCA, Article 19.3.
[113] USMCA, Article 19.16.1.
[114] USMCA, Article 19.11.1.
[115] USMCA, Article 19.8.
[116] See Stop-TTIP European Citizens' Initiative, registered in July 2017, Commission registration number: ECI(2017)000008.

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the necessity of its new FTA generation,[117] in line with European primary law provisions that connect trade with nontrade policy objectives.[118] The most recent generation of EU FTAs incorporate a right to regulate, which is reflected in several provisions, in particular in the context of the sustainable development[119] and investment chapters.[120] More recently, the EU also showed a willingness to include a right to regulate in the digital chapter's provisions.[121] Paradoxically, the recall of the state power to regulate is the prerequisite of stronger trade liberalization[122] and, more broadly, a way in which to legitimize the extension of trade rules.

Older trade agreements, meaning those concluded before 2009, when the Lisbon Treaty entered into force, remained practically silent on the issue of digital trade or electronic commerce. The EU-Chile (2002) trade agreement is probably the first FTA that contains references to e-commerce, probably under the influence of the US-Chile FTA concluded during the same period. However, the commitments were limited as they refer to vague cooperation in this domain.[123] Moreover, the service liberalization was strictly contained within the limits of the positive list-based approach of the former generation of European FTAs.[124] The EU-Korea FTA of 2011 contains more precise provisions on data flows, yet it is limited to specific sectors.[125] For instance, Article 7.43 of this agreement, titled "data processing", is part of a broader subsection of the agreement addressing financial services. The provision encourages free movement of data. Yet, it also contains a safeguard justified by the protection of privacy. Moreover, the parties "agree that the development of electronic commerce must be fully compatible with the international standards of data protection, in order to ensure the confidence of users of electronic commerce". Finally, under this agreement, the cross-border flow of supplies can be limited by the necessity to secure compliance with (internal) laws or regulations, among which is

[117] See, for instance, the Commission's Communication *Trade for All*, COM (2015) 497 final, 14.10 and A Hervé, "The European Union and Its Model to Regulate International Trade Relations" (2020) Schuman Foundation Paper, European Issue n° 554, https://perma.cc/B43D-37P2.

[118] Compare TFEU Article 207.

[119] See JEFTA (Japan/EU FTA, OJ L 330, 27.12.2018, 3–899), Article 16.2.

[120] See CETA, Article 8.9 (in the context of the investment protection's chapter); see also the EU-Canada Joint Interpretative Instrument where both parties "recognise the importance of the right to regulate in the public interest" (OJ L 11, 14.1.2017, 3–8).

[121] See the recently concluded EU/Mexico FTA chapter on digital trade.

[122] This paradox of a deeper liberalization accompanied by measures involving a stronger state and administrative control has been famously pictured by Michel Foucault through his concept of "biopower" and "biopolitics". See M Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978–1979* (New York, Palgrave Macmillan, 2008).

[123] Compare Article 104 of the EU-Chile Association Agreement, OJ L 352, 30.12.2002, 3–1450.

[124] See Burri, note 91 above, at 426. However, after CETA, the EU accepted to conclude FTAs based on a negative service liberalization approach. That is the case of the JEFTA, although the liberalization remains subject to a long list of exceptions.

[125] This evolution might be explained by the existence of commitments on e-commerce in the KORUS FTA, signed in 2007 (see KORUS chapter 15 on Electronic Commerce). However, KORUS Article 15.8 uses soft wording regarding free data flows ("the Parties *shall endeavor to refrain* from imposing or maintaining unnecessary barriers to electronic information flows across borders").

the protection of the privacy of individuals.[126] Although limited to specific sectors, those provisions demonstrate that the EU was aware of the potential effect of data protection on trade long before the adoption of the GDPR.[127]

This sectoral approach has been followed by the EU and its partners in more recent trade agreements, such as the CETA between the EU and Canada, which was concluded in 2014.[128] Chapter 16 of the CETA agreement deals expressly with e-commerce. It prohibits the imposition of customs duties, fees or charges on deliveries transmitted by electronic means.[129] It also states that "[e]ach Party *should* adopt or maintain laws, regulations or administrative measures for the protection of *personal information of users* engaged in electronic commerce and, when doing so, *shall* take into due consideration international standards of data protection of relevant international organizations of which both Parties are a member".[130] However, the CETA also contains another innovative and broader exception clause based on data protection. Article 28.3 addresses the general exception to the agreement, and provides that several chapters of the agreement (on services and investment, for instance) can be subject to limitation based on the necessity to "secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . . the protection of the privacy of individuals in relation to the processing and dissemination of personal data". Finally, the CETA agreement, unlike the US model, does not contain a general free data flow provision and only promotes specific forms of data transfer, consistent with European economic interests, such as financial transfers for data processing in the course of business.[131]

The current European strategy regarding trade and data protection appears more clearly in the negotiations after the adoption of the GDPR. In 2018, the European Commission made public proposals on horizontal provisions for cross-border data flows, and for personal data protection in EU trade and investment agreements.[132] This template is an attempt to reconcile diverging regulatory goals, in particular human rights considerations and economic considerations.[133] This conciliation is also symbolized by the internal conflict, inside the Commission, between the

[126] EU-Korea FTA, Article 7.50 (e) (ii), OJ L 127, 14.5.2011, 1–1426.

[127] At the time, data protection was regulated under the 1995 Data Protection Directive; note 33 above.

[128] Only the investment chapter of the CETA was renegotiated after 2014. The agreement has been provisionally in force since September 2017.

[129] CETA, Article 16.3. However, Article 16.3 clarifies the possibility to submit electronic commerce to internal taxes.

[130] CETA, Article 16.4. Both the 2005 APEC and 2013 OECD privacy frameworks are therefore relevant to justify the parties' regulations.

[131] CETA, Article 13.15.1. However, the following paragraph immediately outlines that the parties are allowed "to maintain adequate safeguards to protect privacy, in particular with regard to the transfer of personal information".

[132] "Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection", https://perma.cc/P6YB-7M9N.

[133] See Yakovleva, note 19 above.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

Directorate General for Trade (DG Trade), traditionally in charge of trade negotiations, and the Directorate General for Justice and Consumers (DG JUST). DG Trade has shown greater sensitivity toward cross-border data flows, whereas DG JUST conceived trade law as an instrument to expand Europe's privacy protections.[134] As a result, this template supports cross-border data flows while also immediately recognizing that the protection of data and privacy is a fundamental right. Therefore, the protection of data privacy is exempted from any scrutiny.[135] This privacy safeguard uses the wording from a clause to the national security exceptions and contrasts with the necessity and proportionality tests put in place under the TPP and USMCA. Not surprisingly, this privacy carve-out was immediately criticized by tech business lobbyists in Brussels.[136]

However, the EU proposals formulated in late 2018, under the framework of the negotiation of two new FTAs with Australia and New Zealand (initiated in 2017), largely confirmed the template's approach. First, the EU's proposed texts refer to the right of the parties to regulate within their territories to achieve legitimate objectives, such as privacy and data protections.[137] These proposals also further cross-border data flows in order to facilitate trade in the digital economy and expressly prohibit a set of restrictions, among which are requirements relating to data localization for storage and processing, or the prohibition of storage or processing in the other party's territory. Moreover, the proposals protect the source code, providing that, in principle, the parties cannot require the transfer of, or access to, the source code of software owned by a natural or juridical person of the other party.[138] A review clause on the implementation of the latter provision, in order to tackle possible new prohibitions of cross-border data flows, is included. Additionally, the European proposals allow the parties to adopt and maintain safeguards they deem appropriate to ensure personal data and privacy provisions. The definition of personal data is similar to the GDPR's conception.[139] This approach is also in line with the EU's proposal, formulated within the context of the plurilateral negotiations regarding e-commerce, which took place at the WTO in April 2019.[140]

The ability of the EU to persuade its trading partners to endorse its vision on digital trade remains uncertain. In this context, the content of the Digital Chapter of

[134] See Streinz, note 98 above, at 334–335.
[135] See Article B.2 of the European Template.
[136] This includes "Digital Europe", which represents the largest European, but also non-European, tech companies (such as Google, Microsoft, Amazon and Huawei). See "DIGITALEUROPE Comments on the European Commission's Draft Provisions for Cross-Border Data Flows" (DIGITALEUROPE, 3 May 2018), https://perma.cc/RPB6-XGUM.
[137] Article 2 of the proposals.
[138] Article 11 of the proposals. However, this provision is potentially subject to the general exception clause of the agreement.
[139] Articles 5 and 6 of the proposals. Under Article 6.4 "personal data means any information relating to an identified or identifiable natural person".
[140] EU proposal for WTO disciplines and commitments related to e-commerce, INF/ECOM/22, 26 April 2019.

the recently concluded FTA between the EU and Japan is not very different from the CETA,[141] demonstrating the absence of real common ground and Japanese support on this issue. Whereas the JEFTA is an ambitious text in a wide range of sensitive trade matters (such as geographical indications, service liberalization and the link between trade and the environment), it only refers to a vague review clause regarding digital trade and free data flows.[142] However, as mentioned earlier, the question of cross-border data flows between Japan and the EU has been dealt with through the formal process that led Japan to reform its legal framework on data protection, which in turn led to the Commission's 2019 adequacy decision.[143] Unilateral instruments remain, for the EU, the de facto most efficient tools when it comes to the promotion of its conception of data protection.[144]

V CONCLUSION

The entry into force of the GDPR coincides with a new era of international trade tensions, which might be interpreted as a new symbol of the European "New, New Sovereigntism" envisioned by Mark Pollack.[145] The European way of addressing the issue of data processing and AI is, in reality, illustrative of the limits of the current European integration process. European industrial policies in this field have been fragmented among the member states, which have not achieved the promise of a single digital market and, even more problematically, have not faced strong international competition. So far, the EU's response to this challenge has been mostly legal and defensive in nature. Yet, such a strategy is not in itself sufficient to address the challenges raised by AI. Smart protectionism might be a temporary way for Europe to catch up with the United States and China, but any legal shield will in itself prove useless without a real industrial policy that necessitates not only an efficient regulatory environment but also public investment and, more broadly, public support. The post-COVID-19 European reaction and the capacity of the EU and its member states to coordinate their capacities, modeled on what has been done in other sectors such as the aeronautic industry, will be crucial. After all, the basis of the European project is solidarity and the development of mutual capacity in

[141] See JEFTA, Article 8.63 (promoting data transfers in the field of financial services) and JEFTA Article 8.78.3 (recognizing the importance of personal data protection for electronic commerce users).

[142] JEFTA, Article 8.81. Similarly, the new digital trade chapter of the renovated EU-Mexico FTA is limited to a three-year review clause when it comes to cross-border data flows. See EU-Mexico renovated FTA Article XX (a provisional version of the text was made public in May 2020 and is available at https://perma.cc/7TAZ-J8F9).

[143] See the Commission's Implementing Decision (EU) 2019/419 of 23 January 2019 on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information, OJ L 76, 19.3.2019, 1–58.

[144] This unilateralism does not preclude political dialogue with the partner.

[145] MA Pollack, "The New, New Sovereigntism (Or, How the Europe Union Became Disenchanted with International Law and Defiantly Protective of Its Domestic Legal Order)", in C Giorgetti and G Verdirame (eds), *Concepts of International Law in Europe and the United States* (forthcoming).

strategic economic areas, such as coal and steel in the 1950s, and a context of crisis and the risk of a decline of the "old continent" may serve as a strong catalyst for an efficient European AI policy.

On a more global and general level, the analysis of the GDPR and the European trade position on data flows and AI illustrates that this new and disruptive sector has not escaped the existing tensions between free trade and protectionism. Unsurprisingly, the new digital trade diplomacy is subject to an old rule: negotiators' positions are largely influenced by economic realities and the necessity to promote a competitive industry or to protect an emerging sector, respectively. Fundamental rights protection considerations that led to a form of "data protectionism" in the EU are certainly also influenced by its economic agenda. On the other hand, the US promotion of free flows of data essentially responds to the interest of its hegemonic companies and their leadership on the Internet and AI. The admission of the free data flows principle from the EU might correspond to the growing presence of data centers in the EU's territory, which followed the entry into force of the GDPR, given the necessity to comply with this regulation.[146] It can also be interpreted as a hand up to its trade partner, in exchange for the admission of a large data privacy carve-out that would legally secure the GDPR under international trade law. However, unless extremely hypothetical political changes occur and a willingness to forge a transatlantic resolution or a multilateral agreement on these questions materializes, the fragmentation of the digital rules on data transfer will likely remain a long-term reality.

[146] See Mishra, note 19 above, at 477.

https://doi.org/10.1017/9781108954006.011 Published online by Cambridge University Press

The European Union and Digital Diplomacy: Projecting Global Europe in the Social Media Era

Chapter · January 2024

DOI: 10.1093/oxfordhb/9780192859198.013.25

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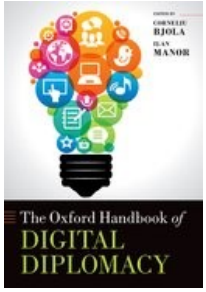

The Oxford Handbook of Digital Diplomacy

Corneliu Bjola (ed.), Ilan Manor (ed.)

https://doi.org/10.1093/oxfordhb/9780192859198.001.0001

Published: 2024 **Online ISBN:** 9780191949715 **Print ISBN:** 9780192859198

CHAPTER

25 The European Union and Digital Diplomacy: Projecting Global Europe in the Social Media Era

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https://doi.org/10.1093/oxfordhb/9780192859198.013.25 Pages 457–474

Published: 23 January 2024

Abstract

The chapter examines the main features and trends characterizing the European Union's (EU) efforts in the digital diplomacy domain. The EU, like other national and international political entities, has recently embraced social media and other digital technologies as a way to engage with foreign audiences and raise its global profile. Because of its unique nature—a hybrid and unfinished political entity mixing intergovernmental and supranational features—the EU's foray into digital diplomacy faces numerous challenges, from its communication strategy's internal (i.e. within the EU) bias, to the lack of coordination among the various stakeholders involved, the competition with member states, to the 'communication deficit' that still besets the organization. As a 'normative power' with less historical baggage and a more positive reputation (at least outside Europe) than its member states, the EU has nonetheless the potential to be successful and effective in projecting its 'soft power' through digital channels. The regional organization has made some strides in this regard, but it has not fully exploited the opportunities that 'going digital' entails. The chapter elaborates on the challenges and opportunities in European Union digital diplomacy by providing empirical examples of EU efforts in this domain (the 2017 'European Way' (EAAS 2017) social media campaign and the EU's communication strategy during the Iran nuclear deal negotiations) and linking them to theoretical debates in the fields of international relations and communication.

Keywords: digital diplomacy, European Union, foreign policy, international organizations, social media, communication, soft power

Subject: International Relations, Politics

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

Introduction

Upon taking office as the European Union's (EU) High Representative for Foreign and Defense Policy, Federica Mogherini claimed that the social media platform Twitter represented 'an extraordinary channel of diplomacy and of communication' and committed to using it as 'one of the fundamental tools of our diplomacy' (Mogherini, quoted in Mann, 2015). As a regional organization with an active presence on the world stage, the European Union has indeed embraced social media and other digital technologies as communication tools deployed to engage with foreign audiences and to project its image globally. The use of digital technology to achieve foreign policy objectives, or what is known as 'digital diplomacy' (Bjola and Holmes, 2015), has acquired a central role in EU communication strategy, and more resources and personnel have been dedicated to this policy area. This trend has accelerated during the Covid-19 pandemic, as the EU turned to 'virtual diplomacy' to manage relations among its members and the rest of the world (Maurer and Wright, 2020).

By turning to online platforms to conduct foreign policy, the European Union has followed the lead of public organizations (both national and international) that have been early adopters of digital technologies in their communicating practices (Bjola and Zaiotti, 2020). However, the Union's foray into digital diplomacy differs from other organizations' because of its hybrid institutional arrangement mixing intergovernmental
p. 458 ↳ and supranational characteristics and its foreign policy's decentralized structure, with EU-level actors and member states sharing responsibilities in this domain (Soetendorp, 2014). These unique features have shaped the approach and practices that constitute the field of EU digital diplomacy, from its governance (centred on the EU diplomatic unit, the European External Action Service (EEAS), but complemented with other EU units and EU member states) to the narrative it has constructed to engage with foreign audiences. In this context, digital channels of communication (websites, blogs, and social media) represent a compelling tool available to the EU to promote its 'soft power' (Nye, 1990; Cross and Melissen, 2013) in world affairs. Digital diplomacy also offers a unique opportunity for the EU to boost its external reputation (Zaiotti, 2020). Like other international organizations, the EU has limited direct sources of legitimacy, and therefore it has to rely on its performance to justify its existence (Maurer and Morgenstern-Pomorski, 2018). The latter requires a concerted effort to showcase one's achievements, a feature that digital communication platforms can provide.

Despite its newly acquired prominence, EU digital diplomacy faces various challenges in its quest for improving the regional organization' relevance and visibility on the global stage. As the latest addition to its communication and public diplomacy toolkit, the EU digital efforts suffer from a legacy of neglect and self-centredness regarding external communication, which, despite recent improvements, still negatively affects this policy domain (Spanier, 2010; Meyer, 1999; Krzyżanowski, 2012). The EU digital diplomacy is also constrained by the complexity and weakness of the Union's foreign policy. The lack of a unified voice and the limited coordination among the various actors who speak on behalf of the EU (especially member states, which maintain a degree of autonomy with regards to foreign policy) limits the ability of the organization to provide a coherent narrative about what the EU stands for. Another challenge, one that is related to the social nature of the communicative platforms used for digital diplomacy, is the still widespread lack of genuine engagement with the targeted audience, a problem that, in fairness, the EU shares with other international organizations. The EU's digital diplomacy also has to counter the growing number of online activities that openly contest the organization. Some of the forces behind these activities have a malign intent (e.g. cybercrime, trolling, misinformation; Bjola and Pamment, 2016). Others reflect the shortcomings of the EU in tackling the various internal and external crises the organization had to face in the last decade (the 'Euro crisis', the 'refugee crisis', and, more recently, the Covid-19 pandemic).

The present chapter presents an overview of the key features of the EU's digital diplomacy and the challenges it faces. The first section traces the origins and evolution of EU digital diplomacy, highlighting

its connections with the organization's efforts in the realms of external communication and public diplomacy. This section introduces the main actors responsible for the planning and the implementation of the EU's digital diplomacy, namely the EEAS, EU delegations around the world, and the European Commission's departments (Directorates General) with an explicit foreign policy mandate. The second section examines the content of the EU-as-'principled and pragmatic global power' narrative that is at the
p. 459 core of the organization's digital diplomacy. The ↳ section also provides examples of how EU foreign policy actors have deployed this narrative through social media and other digital channels. The third section considers the challenges that EU digital diplomacy faces and the efforts made by the organization to overcome them. In concluding, the chapter looks at some directions where EU digital diplomacy is headed.

From 'Public' to 'Digital' Diplomacy: The Evolution of the European Union's External Communication

The European Union's digital communication activities aimed at engaging external stakeholders (i.e. citizens and public officials in non-EU countries) are a key component of the EU's public diplomacy (Cross and Melissen, 2013). Winning the 'hearts and minds' of foreign audiences has been recognized as a priority since foreign policy officially became an area of EU competence in the 1990s (White, 2017). In the early years of the Union's involvement in foreign affairs, however, the term *public diplomacy* was not explicitly used to describe its public relations and communication practices, as the EU was concerned about being perceived as distributing overtly political content or straightforward propaganda (Duke, 2013). Its primary efforts were put into disseminating information to foreign publics, or what Lynch calls 'a glossy "facts and figures" approach to public diplomacy' (Lynch, 2005: 24). Most of these endeavours were delivered in traditional 'analogue' formats (press releases, bulletins, publications). The digital presence of the EU was limited to websites providing information and resources on EU activities abroad.[1] The impact of this messaging was also hampered by the fragmented nature of EU external communication policy, and especially the lack of a coordinating structure and common strategy among the various actors speaking on behalf of the EU. The neglect of this policy area meant that public diplomacy remained the 'Cinderella of the EU's global engagement' (Whitman, 2005: 32).

The turning point with regards to EU public diplomacy and its digital dimension occurred with the creation of a dedicated diplomatic corps, the EEAS (Cross, 2015; Hedling, 2020). EEAS, which became operative in January 2011, was tasked with running EU delegations and offices around the world. Leaderships of EEAS was bestowed to the office of the High Representative of the EU for Foreign Affairs and Security Policy, whose profile was upgraded to include the role of European Commission's Vice President. The new unit took
p. 460 over some of the responsibilities with regards to ↳ communication and engagement with foreign publics previously held by the Secretariat of the Council of the European Union (the institution representing EU member states' interests) and the European Commission (the EU's executive agency). The EEAS was tasked to increase the visibility of the EU foreign policy 'footprint' around the world. The High Representative plays a key role in these efforts, as this office's mandate is to articulate 'clear, convincing, coherent, and mutually reinforcing messages' about EU foreign policy (quoted in Duke, 2013: 132).

The importance of public diplomacy, and external communication more generally, was recognized by the creation of a dedicated unit within EEAS, the Strategic Communication and Foresight unit. The unit is composed of three branches ('divisions'): Communications Policy and Public Diplomacy (CPPD); Strategic Communications, Tasks Forces and Information Analysis (StratCom); and Policy Planning and Strategic Foresight. The CPPD division supports the activities of the EU High Representative and communicates about EU external relations (foreign affairs, security, and defence policy). CPPD includes a 'Digital Communication' section, which is responsible for content and delivery of information through digital media.[2] StratCom and its task forces are mandated to manage communication and counter misinformation

in selected regions around the world. One of this unit's primary responsibilities is coordinating the message so that all EU foreign policy actors follow the line established in Brussels. In its first configuration, StratCom consisted of a small team managing social media (two people) and the spokesperson's service (5–6 persons). It also included a dedicated task force on digital diplomacy. Over time, staff in this unit has grown substantially and currently employs fifty officers, with ten working on issues related to digital communication.

The push to digitalize EU foreign policy has been a core component of EEAS' communication strategy since the unit was created (Mann, 2015). Despite being one of the more recent additions to the EU institutional scene, EEAS was not far behind other EU units in terms of establishing a presence on social media.[3] The unit established accounts on all major social networking platforms (Twitter, Facebook, Instagram, Flickr, YouTube, Vimeo, and the VK in Russian, plus Sina Weibo and Tencent Weibo in Chinese). On Twitter, the most popular platform in EU foreign affairs, EEAS maintains an institutional account (@eu_eeas) and individual handles for the High Representatives and the spokespersons for foreign and security policy.[4] With
p. 461 the Mogherini tenure, the EEAS ↳ introduced a Digital Diplomacy Task Force, with the specific mandate of curating the unit's social media accounts and content for the senior management (Mann, 2015).

While the EEAS is the central cog in the EU external relations' digital diplomacy machine, an essential role in this domain is played by EU delegations, as they represent EU global interest on the ground. The Lisbon Treaty gave delegations legal personality; it also expanded the scope of their activities, now covering all aspects of EU foreign policy. Besides performing 'classic' diplomatic tasks (maintaining relations with local institutions in areas such as trade, development, and scientific and technical cooperation), the delegations play a frontline role in promoting the EU image, interests, and values abroad. Public communication has therefore become a core feature of their activities. Some of the external messaging is deployed through in-person events (press conferences, talks, workshops, cultural events). More and more, however, the core of the EU delegations' communication activities occurs digitally, whether as sole medium or as complementary to the in-real-life events. To fulfil these communication tasks and reach the targeted audience (mainly within the host state), the majority of EU delegations (ninety-six out of 140 at the time of writing) have established a social media presence on the leading social networking platforms (YouTube, Twitter, FB, Fickr, Instagram). Some EU ambassadors posted outside Europe maintain personal social media accounts, mainly in countries with large populations or strategic relevance to the EU.[5] The amount of financial and human resources dedicated to digital diplomacy varies dramatically. Delegations have a press and information officer, who is typically responsible for managing the social media handles. Some of the largest delegations (i.e. Washington, Moscow, Tokyo, and Beijing[6]) have a dedicated unit for communication and are able to deliver a sleek and professional digital communication operation. In some cases, these units' mandate explicitly includes public diplomacy. The US delegation in Washington, for instance, has a Press and Public Diplomacy Section, which was established in 2006. Most of the other delegations rely on the entrepreneurial spirit of their staff (often hired locally and not part of the EU diplomatic corps) working on a small budget. Not surprisingly, the level of digital activity of EU delegations and their ambassadors and their impact around the world fluctuates dramatically.[7]

p. 462 Despite their prominent role in representing the EU abroad, EEAS and EU delegations are not the only entities populating the Union's digital diplomacy universe. This is the case of the European Commission's departments (Directorates General, or DGs) with a foreign policy mandate, namely the DG for International Partnerships (INTPA)—previously DG for International Cooperation and Development (DG DEVCO)—and the DG for Trade (TRADE). The two departments are responsible for managing EU policies in their areas of competence. Part of their mandate is to communicate with the external world about what the EU does and the impact of its policies. The Directorate General for International Partnerships mission is 'to contribute to sustainable development, the eradication of poverty, peace, and the protection of human rights, through international partnerships that uphold and promote European values and interests' (INFPA, n.d.: 4).

DEVCO/INTPA's social media messaging focuses on showcasing the EU action on issues related to cooperation and development, and, in particular, the value of its aid work (European Union External Action Service, 2012: 5). Its core message is geared towards promoting EU actions related to the organization's global commitments, such as the Paris Agreement on Climate Change and the United Nations 2030 Agenda and Sustainable Development Goals. The public relations work of DG TRADE builds on the reality that international trade is one of the most powerful tools in EU foreign policy, given the EU's authority in this domain, and the economic clout that the Union possesses. Traditionally, DG TRADE has emphasized macroeconomic indicators to showcase its successes in its communication practices. With the advent of social media, DG TRADE has tried to boost the appeal of international trade by emphasizing its impact on the everyday life of firms and consumers.

Projecting European Values and Principles: EU Digital Diplomacy and the Quest for International Reputation and Legitimacy

Digital media provide a valuable resource available to EU foreign policy actors to project and, in some cases, expand the European Union's power on the global stage. The EU's ability to exert such power is premised on the existence of a unique and coherent corporate identity vis-à-vis relevant stakeholders. Organizations develop a corporate identity by building a narrative about who they are and what they represent, a narrative
p. 463 that is typically outlined in internal strategic documents, and it is articulated publicly by their ↳ official representatives (Mumby and Kuhn 2018[8]). Since it acquired greater autonomy with regard to foreign policy, the EU has tried to present itself as a 'normative power' in world affairs (Manners, 2002). In this perspective, the EU's global role involves a commitment to deliver peace, security, and prosperity through the promotion of justice, democracy, and human rights. These values are contrasted to traditional realpolitik in international affairs, an approach that relies on 'hard' power (i.e. military capabilities) and national interest. Key pillars of the EU alternative 'soft power' approach that emphasizes persuasion and the support for global progressive causes (e.g., peaceful resolution to disputes, green economic policies, gender equality) are presented as a reflection of the EU's core values. While states (in Europe and beyond) have advanced this normative dimension of their foreign policy, the EU has posited it at the core of its global strategy (EU, 2003). One of the appeals of this narrative is that the EU carries less baggage than its member states, especially the most powerful ones or those with colonial history (Lynch, 2005). The deterioration of the global order (i.e. the growing tensions with Russia and China) and the economic and political crises that hit the continent in the 2010s pushed the EU to reconsider its overemphasis on soft power in the conduct of its foreign policy (Riddervold et al., 2021; Michalski and Nilsson, 2019). Similarly, the growing backlash against the paternalistic approach that the EU had adopted vis-à-vis its international partners, especially those located in Europe's 'neighbourhood', persuaded EU officials to revisit the principles guiding its norm-driven foreign policy (Staeger, 2016). One of the defining elements of this new approach has been a pivot toward the concept of 'resilience' (Juncos, 2017; Tocci, 2020: 177). When applied to the realm of international relations, resilience entails 'the ability of states and societies, communities and individuals to manage, withstand, adapt, and recover from shocks and crises' (European Commission, 2012; quoted in Tocci, 2020: 177). This approach to foreign policy is meant to be more pragmatic, less prescriptive, and more engaged and transformative than earlier iterations of EU foreign policy (Tocci, 2020: 179). Indeed, in *EU Global Strategy for the foreign and security policy of the European Union*, the 2016 policy document outlining the EU's strategic vision, 'engagement' and 'partnership' are mentioned as two principles guiding EU external affairs (EEAS, 2016). This move does not involve the loss of normative principles in EU foreign policy; instead, it encourages the application of a 'realpolitik with European characteristics' (Biscop, 2016) based on 'principled pragmatism' (Tocci, 2020: 180).

EU officials have also recognized that a more sophisticated communication strategy is needed to ensure that this new foreign policy orientation is embedded in the EU's relations with its international partners. The 2016 *Global Strategy*, for instance, lists 'Strategic Communications' as a priority side by side with other more traditional tools of foreign policy. This commitment involves 'joining up public diplomacy across different
p. 464 fields, in order to connect EU foreign policy with citizens and better communicate it to ↳ our partners' (EEAS, 2016). Digital tools, including social media, are central to this communication strategy. Since the early 2010s, EU foreign policy officials posted around the world have been urged to deliver online content that reflects the EU's credentials as a pragmatic and principled foreign policy actor (Manners and Whitman, 2013: 189). According to the 'Information and Communication Handbook for EU Delegations', the internal document drafted in December 2012 by EEAS' Strategic Communication division in collaboration with DG DEVCO, the delegations are asked to relay information that is 'inspired by the promotion of EU values and based on the delivery of peace, security and prosperity' (EEAS, 2012). The emphasis should, in turn, be that of promoting the EU as 'a major partner in democratic transition', 'the world's biggest cooperation and development donor', a 'global economic power', a promoter of human rights, and 'a security provider responding to global security threats' (2012). These tenets have underpinned social media campaigns elaborated by the communication units in concomitance to special events or EU-led initiatives. The issuing *Global Strategy* was accompanied by a dedicated digital campaign on the various EEAS-run social media accounts. The 'European Way' campaign, which was launched in March 2017, used hashtags such as *#EuropeanWay*, *#EUGS*, or *#EUGlobalStrategy* to raise awareness about the EU foreign policy priorities and the implications for stakeholders (Hedling, 2020: 149). Another example of the attempts to diffuse the EU foreign policy narrative can be seen in social media communicative practices related to the theme of gender (Wright and Guerrina, 2020). This theme is a flagship in the Union's normative-driven foreign policy, one in which Europe presents itself not only as an example to follow but also as a supporter of gender causes abroad (MacRae, 2010: 157). Posts related to gender matters are a recurring feature in EEAS social media accounts, especially around special events (e.g., International Women's Day; the EU at sixty celebrations; Wright and Guerrina, 2020).

Digital diplomacy does not only help diffuse the EU's identity as global actor; it also allows the organization to defend, and possibly boost, its global reputation (Zaiotti, 2020). By facilitating direct communication with a global audience, digital platforms allow the EU to project a positive narrative about the organization and showcase its accomplishments. At the same time, social media offer a channel for audiences to engage directly with the EU and express their opinions, thus providing useful feedback on the organization's performance. Besides boosting its reputation, digital communicative tools provide a source of legitimacy for the European Union. The narrative that EU foreign policy actors reproduce becomes a legitimating process since it reminds the public of the positive contribution that the EU's foreign policy provides (Cooper, 2019; Hedling, 2020: 149). This is particularly relevant since the EU suffers similar structural problems affecting other international organizations, namely the lack of direct, bottom-up sources of legitimization. The EU, as a result, has to rely on the assessment of its 'output', namely what it does, and how, to determine its legitimacy (Steffek, 2015). The emphasis on outputs as a source of legitimization is apparent in the EU's digital communication related to its activities in the economic realm. In its social media strategy, DG TRADE
p. 465 has tried to boost the appeal of international trade by emphasizing its ↳ impact on the everyday life of firms and consumers. It has therefore embraced what commentators have called 'Trade Policy 2.0'. An example of these efforts was the social media campaign during the Canada–EU Comprehensive Economic Trade Agreement (CETA) ratification process. The DG TRADE communication team created a Twitter hashtag *#CETAcomes2town* (Cernat, 2018). It complemented this campaign by posting infographics and entries with references to examples of European-made products that could be appealing for a North American market. The department has employed a similar approach for other trade agreements, using the hashtag *#FTAcomes2town*. These types of campaigns are occurring in a global climate that has become more hostile to international trade, and therefore more needed to boost EU economic interests.

The EU has historically been shielded from popular scrutiny, and, as a result, the issue of legitimacy has been relatively invisible as a subject in public and academic debates. Of late, however, attention to its actions has increased due to the various 'crises' it has faced. As a result, the EU has become more active in seeking popular support. As a popular means of communication, social media represent a novel source for the discursive practices of legitimation (Denskus and Esser, 2013). These practices, which can take the form of anything from individual social media posts of influential foreign policy actors to full-fledged social media campaigns, have become a central component of EU digital diplomacy. Indeed, the quest for greater legitimacy was at the core of one of the most compelling examples of EU digital diplomacy to date, namely the Union's involvement in the negotiations over the Iran nuclear deal (Blockmans and Viaud, 2017). In these negotiations, which started in 2013 and were concluded in 2015, the EU's High Representative, together with other international partners (known as the P5 + 1, i.e., the five permanent members of the United Nations Security Council plus Germany) engaged with the Iranian authorities to achieve an agreement on how to manage Iran's efforts to acquire nuclear capabilities. Although these talks were held behind closed doors, the EU maintained a direct channel of communication via social media (mostly Twitter) throughout this time. With the hashtag *#IranTalks*, the High Representative (HR) regularly updated journalists and the public on the state of the negotiations through tweets and the insertion of 'behind the scenes' images of key players at work. The content of tweets was mostly generic rather than including details about the content of the discussions. The stated objective of these digital communication practices was to control the message and avoid misinformation. Yet, this communication also provided a (not so subtle) means to boost the legitimacy and reputation of the EU, and the HR (Federica Mogherini) more specifically. As the EEAS official running the account explicitly admits, this communication was aimed at 'carefully reflecting the HR/VP's role as facilitator of the talks'.[9] This role, combined with a proactive presence on social media, meant that the HR could grow her social media profile. She was able to grab the attention of a larger audience. The news of the Iran deal was announced on HR's Twitter account, and the tweet became the most popular item issued on the platform.

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Challenges in EU Digital Diplomacy: The Quest for Coordination and Coherence

The Lisbon Treaty and the creation of EEAS raised the prospect for greater institutional coherence and consistency in EU external communication. It also provided a framework for the emergence of a common 'communication culture' spanning all the EU foreign policy institutions (Duke, 2013: 10). Indeed, the number of voices speaking for the EU was reduced (e.g., the elimination of a rotating presidency). Practical steps were taken to coordinate communication and public diplomacy within the foreign policy establishment. These efforts included strengthening the collaboration with the EU 'internal' communication units, and in particular with the European Commission's DG Communication. After the Lisbon Treaty, this task fell to the newly established External Relations Information Committee (ERIC), which brought together the Commission's communications units and, unlike its predecessor (RIC), is now responding to the Strategic Communications Division in the EEAS.

Related to the issue of coordination, another task the EU has taken up is that of improving the coherence of its external communication. This topic is explicitly mentioned in the 2016 EU Global Strategy. The document called for action to 'improve the consistency and speed of messaging on our principles and actions', both in terms of factual rebuttals of disinformation and 'fostering an open and inquiring media environment within and beyond the EU' (EEAS, 2016: 23). This 'retooling' of external communication is apparent in the approach the EU has taken regarding content delivery on digital platforms. In 2020, the DG for International Partnerships issued 'Digital Content Guidelines', a manual directed at EU delegations and external service providers.[10] These actors are encouraged to promote the EU through 'positive, inspiring and challenging

communication, which is values-driven and impact-focused'. The 'European values' it envisions are sustainability, equality, democracy, human rights, and partnership (INTPA, 2020: 5). The principles that this messaging should follow are 'professional yet human (…) complete yet concise (…) sincere yet positive'.

Despite these efforts at achieving greater coherence, the EU's digital diplomacy is still riddled with obstacles that limit its effectiveness. The first has to do with the continued existence of a plethora of actors speaking on behalf of the EU on the world stage. Some of these actors fall under the EU common foreign and security policy mandate (the President of the European Council, the High Representative, the EEAS, and the member states), others under the Commission (the President of the Commission and Directorates General with an external mandate). Even within the External Action Service, multiple hands are on the communication file.
p. 467 In the original plans leading to ↳ the creation of EEAS, the High Representative was assigned a department for information and public diplomacy. This department did not materialize, and the public diplomacy file was instead scattered within EEAS (Duke, 2013). Member states also continue to have an active voice in matters of EU external communication. Their influence is exerted through the Political and Security Committee (PSC), a unit within the European Union dealing with common foreign and security policy issues.[11] In its remit, the PSC negotiates 'master messages' for civilian missions, and 'communication strategies' for military missions, all of which need to be approved by member states.

Since the creation of EEAS and the move to digital communication, the EU has pledged to streamline how the organization engages with the rest of the world. Rather than relying on a traditional approach based on strategic communication, the emphasis is now on a more nuanced and engaged method. As a communication expert at EEAS put it:

> It is about different things, using different channels, different events, communication strategies and public affairs but the central thing is that this is no longer about informing it is about explaining, engaging and listening.
>
> (Quoted in Hedling, 2020: 148).

The digitalization of EU external communication, however, has not eliminated the organization's old habits. Indeed, this shift might have actually reinforced the deep-seated dispositions in EU communicative practices (Krzyżanowski, 2020). One of these dispositions is that of tightly controlling the messages that EU delegations and other EU foreign policy actors sent to the outside world. Social media content must be approved by the External Action Services' headquarters in Brussels ahead of time. The broadcasting of pre-approved messages is acceptable, but not public interactions that could derail delicate negotiations. While this control is common to other foreign policy actors, especially foreign affairs ministries, the EU must tread a finer line, as it must ensure it does not breach the delicate balance of consensus among the twenty-seven members.

Other problems persist regarding how the EU engages its global audience in the digital realm. Looking at the EEAS' 'footprint' on social media (Facebook, Flickr, Twitter), we notice a degree of interactivity ('likes', re-tweets, and comments). Yet, these efforts fall short of continued engagement. Only a few comments posted on the EEAS handles contain a reply from the administrators. The attempts to project a normative foreign policy through digital channels are also underwhelming. In their study covering social media activity during International Women's Day and the EU's sixtieth anniversary in 2017, Wright and Guerrina (2020) found that the EU did not effectively integrate gender equality in its digital diplomacy, keeping it on the margins of
p. 468 ↳ EU external communication practices. Another challenge the EU digital diplomacy faces is the growing level of scrutiny and contestation that social media platforms have brought. Like other international organizations active on the world stage, the EU has been historically shielded from popular scrutiny. As a result, the EU has rarely been an object of contention in global public discourse (Ecker-Ehrhardt, 2017). However, the growth of the EU's role in world affairs, and the visibility that it has brought, have led to

greater politicization of the organization, and with it, the potential for criticism (Zürn et al., 2012: 71). More and more, this criticism has been delivered through digital channels. As a popular means of expressing opinions, social media have become a powerful tool of political contestation, especially when coming from civil society (Zaiotti, 2020). Social media have also been used to spread misinformation about the EU (Bentzen, 2019; Scheidt, 2019; Vériter et al., 2020). When faced with open contestation, the EU, like other organizations in similar situations, have felt compelled to respond to avoid further negative backlash, with a view to rebuilding the trust of their audience (Bentzen, 2019). Fighting misinformation online is a central component of the EU cybersecurity strategy.[12] The EU has set up a dedicated agency whose task is to contain or prevent malicious efforts carried out on social media and other digital platforms. The *European Network and Information Security Agency* (ENISA), originally established in 2004, has seen its mandate and resources boosted in recent times. Responding to critical situations is particularly needed for organizations such as the EU since it relies heavily on output legitimacy. Yet, the core component for a successful response to a crisis is to focus on its communication strategy, which involves being open to external feedback and adjustments of actions to reflect the public mood (Steffek, 2015: 275). To date, however, most of the focus of EU action has been internal (i.e., on misinformation within the EU), and limited resources have been allocated to the external dimension.

The EU management of its global reputation through digital channels has also been underwhelming and overtly passive in the face of the series of economic and political crises the EU faced in recent times (Zaiotti, 2020). These crises—from the one involving the Euro in the early 2010s ('Eurozone crisis'), to the surge in migration flows around Europe's south-eastern borders in the summer of 2015 ('refugee crisis'), to the Covid-19 pandemic in 2020—were 'internal' matters, as they affected the stability of the European integration project; they nonetheless had important 'external' implications, because they threatened to tarnish the global image of the EU as a successful political project and a model to follow elsewhere (Nedergaard, 2018; Georgiou and Zaborowski, 2017). EU officials acknowledged that these events negatively affected the EU brand. At the height of the refugee crisis, for instance, then High Representative for Foreign
p. 469 Affairs and Security policy of the EU, Federica Mogherini, stated that EU action on the issue ↳ of the refugee crisis 'greatly weakens our credibility abroad'.[13] The EU public diplomacy machine, however, did not effectively mount a consistent effort to address this challenge by engaging the public on the meaning of these crises and the responses by the EU. As a result, these issues were mostly ignored in the digital communication conducted by EEAS officials in Brussels and delegations around the world (Zaiotti, 2020).

Conclusions: Overcoming the Capability-Expectations Digital Gap

The EU as an organization has been slow in realizing that actively engaging with foreign audiences was a crucial component in its efforts to become a prominent actor in foreign affairs. Because of its recent emergence and difficult gestation, EU foreign policy has been conservative and inward-looking. The creation of a dedicated foreign policy service changed this stance. The concomitant emergence of social media and their embracing by foreign policy actors meant that the EU had to become more proactive in the digital domain. The EU has recognized that digital platforms are an essential tool in contemporary world affairs for the purpose of communicating and engaging with the outside world, particularly foreign audiences. Arguably, the EU needs to rely on these platforms more than other policy actors, given its still-limited visibility and ability to influence world affairs through traditional diplomatic means. The EU has made important strides in upgrading its digital presence, as witnessed by its active involvement in various social media platforms. The EU has also made efforts to provide a more coherent message to be conveyed on these platforms and to rationalize the management of its external communication.

The EU's efforts in digital diplomacy, however, still face serious hurdles. The main challenges have to do with the enduring cacophony of voices speaking for the EU, the tension with its 'internal' public diplomacy

(i.e. engaging with EU stakeholders within Europe), and the still underwhelming level of coordination among all these actors. These lingering problems raise the question of whether the solutions the EU has pursued (striving for greater centralization, common message) might not actually be wrongly conceived or even deleterious. In the absence of a well-defined strategic view, a path to follow might be greater decentralization, with more direct involvement of EU delegations in shaping the EU's message, core themes, and engagement strategies (Duke, 2013: 33). The rivalry between member states and the EU foreign
p. 470 policy apparatus might be managed more effectively if the emphasis is put on the complementarity ↳ of their actions. It should be noted that EU member states' public diplomacy strategies typically include a reference to boosting the Union's global profile, and it would not be unreasonable to expect that this could also be done for its digital counterpart.

Complementarity could also be the way ahead to overcome the tensions between efforts to engage stakeholders in Europe and beyond. The internal and external dimensions of EU digital diplomacy are not incompatible. Indeed, in both cases the purpose is, as the European Commission puts it, that of 'promot(ing) EU interests by understanding, informing and influencing. It means clearly explaining the EU's goals, policies and activities and fostering understanding of these goals through dialogue with individual citizens, groups, institutions and the media' (European Commission, 2007: 12). Establishing a cogent narrative about what the EU represents aimed at individuals residing within Europe can also provide a model and a boost for efforts to project this identity to the rest of the world. In this reading, digital diplomacy should be considered as a type of 'intermestic' domain, one that merges domestic and international dimensions.

The case for greater digitalization of EU foreign policy should not be overstated, however. Social media have been hailed as having a positive impact on private and public organizations in terms of meeting their mandates and performing their functions (Collins and Bekenova, 2019; Sandre, 2015); yet it is not clear this assessment applies to foreign policy, and particularly for the EU, given its sui generis status. For all this talk about digitalization as the future of EU foreign policy, digital tools might not be the solution to EU foreign policy problems after all; on the contrary, there are inherent tensions with these tools that might be detrimental to the success of the EU on the world stage (Hedling, 2018). Some of these issues have to do with the very characteristics of social media. While social media platforms promote a more visible digital presence, their decentralized, informal, and personal nature, combined with their capacity to multiply the number of voices who speak on behalf of an organization, means that the message they convey can come across as inconsistent and confusing, and, as a result, it weakens their efforts at projecting a coherent identity (Bjola and Zaiotti, 2020). In this way, social media can exacerbate an inherent tension that characterizes the EU's identity, namely the one between the EU's quest for a collective sense of community and member states' emphasis on their unique features and histories. There are also questions about the compatibility of digital channels and EU foreign policy. Part of the reason is that, unlike domestic politics, foreign policy in general is resistant to what Brommesson and Ekengren (2020) call the 'media logic'. As the authors put it:

> Foreign policy is traditionally seen as a conservative policy area characterized by caution and prudence. Because foreign policy decisions are frequently made in small, closed groups, it is not publicly debated as frequently as other policy areas. Foreign policy issues are therefore less public and debate in the media is more limited. These characteristics stand in sharp contrast to the media logic, with its short-sightedness and focus on individual cases along with its sensationalism rather than long-term perspective.
>
> (Brommesson and Ekengren, 2020: 3–18)

p. 471 This characterization does not imply that mediatization of foreign policy never occurs, but only under certain circumstances, which depend on contexts, time periods, and types of questions (Brommesson and

Ekengren, 2020).

The EU is not unique in its struggles to use digital diplomacy effectively. Indeed, other organizations (including international organizations) are in a similar predicament. For digital diplomacy, however, as it is the case for other aspects of its foreign policy, the EU suffers an additional handicap, namely the digital version of what is known in the EU foreign policy literature as the 'capability-expectations gap' (Hill, 1993). This term refers to the belief that the EU should be able to perform its duties as a major foreign policy power, given its size and its constituent parts' political and economic prowess. Since the EU presents itself as a progressive, future-oriented entity at the forefront of innovation, it has raised the expectation that it should be a leader in digital diplomacy as well. In reality, the resources allocated to support these efforts, and still-limited autonomy of the EU in foreign affairs, means that these expectations have not been met. Until this gap is bridged, the EU digital tools might not turn out to be such 'an extraordinary channel of diplomacy' for the EU as Mogherini envisioned them.

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Notes

1 The.*eu* internet domain was established in 2005. EU institutions adopted the *europe.eu* domain on Europe day (9 of May) in 2006 (previously they used *eu.int*).

2 https://op.europa.eu/en/web/who-is-who/organization/-/organization/EEAS/EEAS_CRF_249116

3 The European Parliament was the first EU institution with a social media presence with a Twitter account (April 2009) and a Facebook page (May 2009). The EEAS Twitter account was created in October 2009, while a Facebook page was established in May 2011. It should be noted that the creation of EAAS coincided with the popularization of social media platforms and their adoption as communication tools by public and private organizations.

4 Followers on the official EEAS's Twitter account have grown from 94,000 in 2015 to 192,000 in 2017 and 372.000 in 2021. The High Representative's followers during the Mogherini tenure grew from 123,000 in 2015 to 347,000 in 2017. As of 2021, Mogherini's successor, Josef Borrel (who took over in 20019) has just over 200,000 followers.

5 At the time of writing, the EU ambassadors on social media are 33; see https://eeas.europa.eu/headquarters/headquarters-homepage/9005/. Special Representatives (EUSRs) constitute a sui generis category of EU emissary (Tolksdorf, 2015). The EUSRs' mandate is to collaborate with local and international partners to promote peace and stability in troubled parts of the world or support specific issues (e.g. human rights). In performing their duties, these offices promote EU interests and policies. The number of Special Representatives has fluctuated over time—the first one established in 1996—and at the time of writing they are nine, of whom some are based in the region or country they represent, and the rest in Brussels.

6 The delegation in Moscow has a Press and Information Department; Tokyo has a Press, Public and Cultural Affairs section, while Beijing has a Press and Information Section.

7 Other actors within the EU foreign policy family that contribute to organization's digital diplomacy are the civilian and military missions that the EU maintains around the world. These missions all have a digital presence on various social media platforms (e.g. Facebook, Twitter), and their main purpose is to inform about their activities. In their digital activities, the missions adopt a communication approach and set of guidelines similar to the ones of EU delegations.

8 As an organization's projected image, a corporate image is created for the purpose of increasing the organization's reputation (i.e. collective beliefs about organization held by external stakeholders; Orlitzky et al., 2003). In this sense, the creation of a corporate identity is consistent with what in marketing is called 'branding'.

9 https://twiplomacy.com/blog/the-european-external-action-service-and-digital-diplomacy/

10 DG INTPA, Digital Style Guide, December 2020.

11 PSC, which is based in Brussels, consists of ambassadorial-level representatives from all the EU member states and is chaired by the EEAS.

12 European Commission 2020, 'Joint Communication to the European Parliament and the Council: The EU's Cybersecurity Strategy for the Digital Decade', JOIN (2020) 18 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020JC0018&from=ga

13 'Mogherini: EU will lose its reputation because of refugee crisis', Meta MK, 25 September 2015, Available at http://meta.mk/en/mogerini-eu-go-gubi-ugledot-poradi-begalskata-kriza/

13. EU climate leadership: domestic and global dimensions[1]

Paul Tobin, Diarmuid Torney and Katja Biedenkopf

1. INTRODUCTION

Environmental high performers can identify best practice initiatives, increase their existing standards, and attract followers willing to join them in doing the same (Wurzel et al. 2021). When addressing relatively delimited environmental challenges, the willingness of a central player to act – such as, in the case of the ozone, the USA and its chlorofluorocarbon-producing corporations – can be highly influential for arresting degradation (Falkner, 2005). However, the multiplicity of actors, sectors and gases that contribute to climate change make this specific environmental threat a particularly complex policy challenge. As such, climate leadership anywhere in the world – be it within an individual organization, a local area, or specific sub-sector of the economy – is welcome. However, the European Union (EU), with its 450 million citizens, $18 trillion economy and above-global-average greenhouse gas (GHG) emissions per capita, arguably holds particular capacity, and responsibility, to be a global climate leader.

In the early 2000s, the EU played a pivotal role in the entry into force of the Kyoto Protocol (Oberthür and Dupont, 2011; Vogler, Chapter 10 in this volume), and for much of the 2000s, used a narrative of climate leadership as a means of establishing a 'green myth' around its international identity (Lenschow and Sprungk, 2010). Since the 2000s, though, much has changed. The remaining time for action, if the worst effects of climate change are to be avoided, has diminished, leading to widespread declarations of a 'climate emergency'. Global GHG emissions have grown while the EU's have shrunk, both in absolute terms and as a share of the global total. A decade of crises (Falkner, 2016) has been continued by the pandemic (Dupont et al. 2020) and a return to war (in Ukraine) and geopolitical conflict in Europe reminiscent of the Cold War era. We are more aware than ever of the utility of every actor playing their part within a 'polycentric' web (Jordan et al., 2018; Ostrom, 2010), even though responsibility for the most egregious exploitation of resources can be levelled at a small number of individuals and corporations. By 2030, dramatic global emission reductions are needed (IPCC, 2018). Thus, as we approach that year, what kinds of leadership, if any, can we ascribe to the EU, both regarding how it influences the countries, organizations and individuals within its borders, and its international behaviour?

This chapter begins with a conceptualization of leadership. We note that 'leaders' aim to attract followers while 'pioneers' do not, before outlining the varying 'types' and 'styles' of leadership identified in the field, which later underpin our analytical sections. We critically reflect on this literature, emphasizing that unlike much of the research on political leadership, where an effective leader can be a malevolent force (see Rhodes, 2014), climate leaders have come to be understood as normatively good (e.g. Liefferink and Wurzel, 2017; Wurzel et al., 2019). This framing has created a gap in our understandings of how 'negative climate leadership', a term we introduce here,[2] could lead others away from progress on climate change.

From there, we analyze and reflect upon EU climate leadership in three areas: (i) the EU's European Green Deal; (ii) the EU's leadership at international climate negotiations; and (iii) the EU's climate leadership through broader external governance. At the foundation of our analysis is the important understanding that the EU is not a monolithic actor, and so EU leadership will be inherently multi-dimensional and multi-actor to some degree (see Bulkeley and Betsill, 2006; Jänicke and Wurzel, 2018). Moreover, through our three analytical sections, we see the EU exhibit different types and styles of climate leadership. In sum, the EU is a complex and dynamic assemblage that is simultaneously capable of being different types of leader, and/or potentially also a pioneer, follower and laggard, across multiple levels, and/or to changing degrees over time. We encourage scholars to embrace this complexity, and in our final section, we suggest areas for future research, including a wider conceptualization of what it means to be a 'leader' within the realm of climate governance.

2. CONCEPTUALIZING LEADERSHIP

European states, and the EU, have been the predominant focus of research on climate leadership (e.g. Eckersley, 2016; Grubb and Gupta, 2000; Oberthür and Roche Kelly, 2008; Torney, 2015; Wurzel et al., 2017). As this body of literature has matured, greater conceptual clarity has been pursued around exactly what we mean by 'leaders', 'pioneers' and any other synonyms for those actors that champion higher ambition in tackling climate change. First, in contrast to 'laggards' (e.g. Tobin, 2017), which trail behind the strongest performers, the literature perceives climate leaders as being those that are effective in seeking to protect the climate. As we discuss further below, such an understanding is contrary to the less normatively laden understandings of political leadership that exist outside of studies on climate governance (see Lipman-Blumen, 2006; Rhodes and 't Hart, 2014). A second aspect of the conceptualization of climate leadership – established in the literature relatively recently – is that a 'leader' is distinguished from a 'pioneer': pioneers act without the intention of attracting followers, while leaders do seek to attract followers (Liefferink and Wurzel, 2017). Thus, our focus in this chapter is on leadership dynamics across a multitude of contexts. While this conceptualization of 'climate leadership' seems straightforward, scholars have sought to add extra nuances, which merit further examination below.

2.1 Types and Styles of Climate Leadership

There are numerous conceptualizations of what *types* of climate leaders may exist, which often share many similarities. For example, while Grubb and Gupta (2000) suggested 'structural', 'directional' and 'instrumental' leadership types, Parker, Karlsson and Hjerpe (2015) proposed the addition of 'idea-based' leadership. In the late 2010s, Liefferink and Wurzel, plus co-authors, built on these typologies with their own four-part framework (see Liefferink and Wurzel, 2017; Wurzel, Connelly and Liefferink, 2017; Wurzel, Liefferink and Torney, 2019), which has garnered academic traction. This framework is inherently descriptive in its objectives, rather than explanatory, but serves effectively to illustrate leadership practices.

Liefferink and Wurzel (2017) begin their conceptualization of climate leadership with *cognitive leadership*, which is the proposal or development of ideas that shape subsequent action by fellow actors; a case in point here is the wealthier EU Member States' support for techno-

logically focused, pro-capitalist 'Ecological Modernisation' solutions during the late 1990s/early 2000s (Jänicke, 2005; see Fitch-Roy and Bailey, Chapter 12 in this volume). The EU's elaboration of the concept of a comprehensive and cross-cutting European Green Deal (EGD) is the focus of Section 3 in this chapter. Although this might be seen as having *followed the cognitive leadership* of influential US politicians such as Alexandria Ocasio-Cortez, the EU's conceptualization of its own proposed equivalent was distinctive (Fitch-Roy and Bailey and Quitzow et al., Chapters 12 and 24 respectively in this volume), and arguably *demonstrated exemplary leadership* through its earlier introduction of the EGD than any equivalent in the USA, whereby a high-profile attempt was stymied in 2019.

Second, *entrepreneurial leadership* occurs when an actor engages in effective diplomacy and negotiation. The EU's lack of effectiveness at the 2009 Copenhagen 'Conference of the Parties' (COP) of the United Nations Framework Convention on Climate Change (UNFCCC), before engaging as a 'leadiator' – leading and mediating at the same time – a year later at the Durban COP (Bäckstrand and Elgström, 2013), reflects how an actor's climate leadership at international negotiations may ebb and flow. We discuss the EU's more recent attempts at entrepreneurial leadership at COPs in Section 4.

Third, *structural leadership* is shaped by an actor's economic and military power, and also its potential importance to negotiations. A significant emitter of GHGs may wield 'issue-specific' structural power at international negotiations, derived from its centrality to climate mitigation. Thus, as the EU continues to reduce its emissions relative to other key actors in the global arena, we may see its capacity for structural leadership diminish over time (see Tobin and Schmidt, 2021; Biedenkopf, Dupont and Torney, 2022), necessitating new strategies for international climate leadership. We analyze the EU's structural external power in more detail in Section 5 of this chapter.

The fourth type of leadership, *exemplary leadership,* is the 'intentional setting of examples for others' (Wurzel et al., 2021: 8; emphasis in original). We see instances of exemplary leadership in each of our sections below on the EU's internal policies, international negotiations and trade activities. Indeed, a leader can demonstrate multiple forms of climate leadership at once, or emphasize some types at certain times or in specific contexts (Wurzel et al. 2021). In short, frameworks of climate leadership, such as Liefferink and Wurzel's (2017), enable characterizations of climate leadership to be ascertained, which in turn enables scholars to focus on actors' strategies for pursuing these leadership types, and the implications of doing so.

Alongside the *type* of leadership, we may also note two *styles* of climate leadership. Building on the work of both Hayward (2008) and Burns (2003), Liefferink and Wurzel (2017) distinguish between humdrum/transactional and transformational/heroic leadership styles.[3]

A humdrum/transactional leader will be more incremental in its approach, prioritizing marginal but steady adjustments over time. In contrast, transformational/heroic leaders will pursue more abrupt, radical and 'transformational' strategies, but perhaps less frequently. Transformational leadership may lead to, or at least aim at, change in the structural makeup of followers, or alterations in the guiding paradigms that underpin how a society functions.

In addition to adding analytical nuance, the conceptualization of transactional/transformational leadership styles is useful for bringing the importance and role of *followers* into conversations around leadership. If, as we note above, a leader is distinguished from a pioneer by its desire to attract followers, then the existence of followers, or not, and the rationales for followers joining leaders, deserve special attention. A first foray into understanding the 'other side of the coin' to climate leadership is Torney's (2018) investigation of which actors become

followers, the pathways through which followership emerges, and the factors facilitating and hindering followership. Torney's analysis rests on an understanding of climate governance as being 'polycentric' in nature, which we share. Polycentric governance exists when there are multiple private and public organizations, which are independent from one another yet overlap, acting across multiple levels, with implications for shared common pool resources (see Jordan et al., 2018; Ostrom, 2010). While multi-level governance perspectives have often been used to analyze the EU (see Stephenson, 2013), polycentric studies include a wider assemblage of actors (Wurzel, Liefferink and Torney, 2019: 2–3). Thus, in our exploration of EU climate leadership, we examine the Union's efforts to demonstrate leadership across multiple levels, with an understanding that all governance must be polycentric to some degree.

2.2 Introducing 'Negative Climate Leadership'

Beyond the types and styles of climate leadership summarized above, there remains a conceptual elephant in the room: how do we label actors within the field of climate governance that do not seek rapid reductions in GHGs, and instead push in a different direction? The wider literature on leadership can offer guidance. Political leadership, Blondel (2014: 705) argues, 'measures the extent to which political life in a polity can be attributed to its top ruler or rulers of that polity. It is a subcategory of leadership in general.' It is an important – and unfortunate – reality that political leadership has often been simply incompetent, or even normatively malevolent (Lipman-Blumen, 2006). Yet, many explorations of leadership have focused on the heroes, innovators, and sources of integrity (Rhodes, 2014). Thus, it is no surprise that the widespread understanding of a 'climate leader' that has garnered traction assumes an ambitious actor that is seen as normatively good in its pursuit of effective climate policy (Liefferink and Wurzel, 2016; Wurzel et al., 2019). Indeed, scholars seek to identify 'leaders versus laggards' (Tobin, 2017) with an implicit, or even explicit, assumption that a leader on climate change will be a high-flying performer, rather than an actor that attracts followers to pursue its climate goals, *whatever they may be*. In this regard, there exists a gap in the literature on climate leadership (see Tobin and Wylie, 2021). Now that a pro-climate action social norm has been widely established, 'negative climate leadership' occurs when an actor voluntarily attracts followers in order to lead them away from more ambitious action on climate change. Yet to date, anti-climate stances have not been explored within the literature on 'climate leaders' as manifestations of leadership, creating a tacit assumption that leadership regarding climate change only entails pro-climate action.

Although a little more conceptual completeness is obtained through the acknowledgement that negative climate leadership must also exist, employing this term hits upon two immediate snags. First, due to the increasingly influential social norm rooted in international agreement that mitigating climate change is the 'right thing to do', we may expect negative climate leaders to wish to keep their activities as clandestine as possible. Indeed, this threat of social opprobrium underscores why scholars of 'policy dismantling' emphasize the 'visibility' of such behaviour within their studies (Bauer et al., 2012), and researchers have found low-visibility dismantling difficult to demonstrate (see Eckersley and Tobin, 2019). Put simply: negative climate leaders may pursue their goals behind the scenes, hindering academic attempts to research into their actions. Then again, as Donald Trump's record on climate change suggests, negative climate leadership can be championed *because of* its contravention of others' norms (Selin and VanDeveer, 2021).

Second, as mentioned above, climate change is a complex policy problem, often depicted as a 'wicked policy problem *par excellence*' (Jordan and Moore, 2020: 3). As such, the motivations for why an actor wishes to seek followers in deviating from pro-climate norms may be a lack of resources, or a focus on other policy priorities, such as alleviating poverty or adapting to the impacts of climate change. Labelling less well-resourced actors as negative climate leaders, when the motivations for these climate actors' actions are situated in a prioritization of other, perhaps seemingly more pressing, issues, appears patronizing or even neo-colonial. Thus, the analysis of anti-climate leadership has been neglected, despite the potential utility, resulting in an understanding of leadership that is skewed only towards pro-climate behaviours. Hence, as with the categories of climate leadership types and styles above, we introduce the concept of negative climate leadership as a descriptive, rather than explanatory, tool, and as a means of providing conceptual completeness when considering climate leadership. With the above caveats in mind, we propose this descriptive term to enable scholars to investigate such activities as manifestations of leadership, and avoid neglecting the political realities of contemporary climate policymaking.

3. THE EUROPEAN GREEN DEAL

The EU has steadily increased its commitments to climate action since the early 1990s, eliciting extensive academic analysis (e.g. Böhringer, 2014; Jordan et al., 2010; Oberthür and Dupont, 2015; Rayner and Jordan, 2013). Here, we discuss the European Commission's 2019 flagship strategy, the EGD, which aims to steer EU climate action for decades to come. Commission President Ursula von der Leyen described the EGD as the EU's 'man on the moon moment' (see Hutchison, 2019), reflecting the heroic/transformational style of leadership that the EGD entails. Indeed, the EGD can be characterized as a combination of cognitive and exemplary leadership, with some degree of structural leadership. Yet, when analyzing the EU and its policies, we cannot attribute a single label regarding leadership performance – rather, dynamic trends and numerous constitutive parts collectively produce a complex whole. A comprehensive understanding of global climate action requires the acknowledgment of action at the national and subnational levels (Betsill and Bulkeley, 2006), as well as the involvement of non-state actors within a 'polycentric' framework. Thus, any reflection regarding EU climate leadership merits some examination of how it influences other actors – be they states, businesses or individuals – within its borders (see Bürgin, Chapter 2 in this volume). Below, we explore how the EGD overall represents an ambitious and comprehensive step forward, comprising up to €1 trillion in funding and wide-ranging actions that seek to transform almost every sector of politics and the economy. We also note, though, that some of the leadership directed towards individual sectors is more humdrum/transactional in nature, while some Member States have exhibited their own leadership dynamics.

The proposed list of actions within the 2019 EGD Communication seeks to achieve a more sustainable Europe across every sector of the economy, with a clear timeline for when each goal should be achieved. The European Climate Law proposed by the Commission in March 2020 and adopted in 2021 enshrines a goal of climate neutrality for the EU by 2050. In October 2020, then-US Presidential candidate Joe Biden announced his 2050 climate neutrality pledge, and Japan's Prime Minister, Yoshihide Suga, made the same commitment as the USA in the same month, while China set a carbon neutrality target for 2060.

Underpinning the EGD's climate neutrality commitment is a wide range of initiatives, such as the 'Fit for 55' package of July 2021 that seeks to implement the EGD's target of a 55 per cent reduction in emissions by 2030, the 'Farm to Fork' plan for agriculture (see Matthews, Chapter 19 in this volume), and a dedicated offshore renewable energy strategy. Reflecting the polycentric nature of the governance network being shaped by the EGD, the Commission created a 'Climate Pact' public consultation for uniting regions, local communities, businesses and civil society into the policy process (on regions and city-level action, see Kern, Chapter 8 in this volume; on business, see Eckert, Chapter 6 in this volume; on civil society, Parks et al., Chapter 7 in this volume). These initiatives, and several others that support the EGD, demonstrate instances of the Commission's cognitive leadership. This leadership type was supported by structural leadership; the EU committed up to €1 trillion in funding for sustainable investments, of which €503 billion should come from the EU budget. While €114 billion is expected from national governments, the InvestEU programme, guaranteed by the EU, aims to trigger more than €372 billion of investments from the private sector during 2021–2027, again reflecting the polycentric nature of the EGD. Separately, though, there are concerns that some of the EU's investments – namely the 'Just Transition Mechanism' – will not reach the intended recipients and instead head for those already profiting via the status quo (Gabor, 2020). A similar critique can be made of the Fit for 55: Özdemir (2021) argues that it maintains an assumption around the nature of global trade – and the EU's role within it – that is not inclusive towards the most vulnerable people and societies of the world. After all, the EU is a capitalist trading bloc; one may question how far such an organization can ever be *transformational* in its approach to climate change (see Newell and Paterson, 2010, and Fitch-Roy and Bailey, Chapter 12 in this volume).

In addition to non-state actors, the EU has sought to lead its 27 Member States. Leadership of such a diverse body of countries, which vary greatly in their size, level of economic development, and emissions of GHGs, is difficult. One instance of cognitive leadership that slightly preceded the EGD was the 2018 requirement of states to create 'National Energy and Climate Plans' (for more on which, see Knodt, Chapter 14 in this volume). These extensive documents – of which Czechia's, for example, is 439 pages long – outline how states intend to improve their energy efficiency, renewables, GHG emission reductions, energy interconnections, and research and innovation. Few, if any, represent new heroic/transformational leadership, and instead are more transactional/humdrum in their approaches, as they primarily summarize existing plans into a single document. The Commission provided feedback on draft versions submitted in December 2019, with a view to more ambitious documents being returned 12 months later; the Commission broadly appears to have succeeded in leading the Member States to elevate their ambitions (see Schultz, 2020). Further research is needed to explore the intricacies of these dense documents, and the extent of the changes made between draft and final documents. Yet, many states altered their NECPs in response to feedback (Moore and Tobin, 2021), reflecting the Commission's entrepreneurial leadership in necessitating and co-ordinating the NECP process in a manner that generated a willingness to elevate ambition within the Member States.

If implemented successfully, the EGD holds the potential to demonstrate transformational leadership from the EU, but this path has not been without challenges. Questions remain regarding the degree to which the EGD sufficiently embeds a long-term perspective through robust long-term governance frameworks. Moreover, Member States have at times dragged their feet in following the Commission's ambitions, while others have asked for greater

ambition. For example, several states, including Germany and Ireland, submitted their NECPs months later than requested, which would have cut short the time available for the EU to ramp up ambitions for COP26 in December 2020, had the event not been postponed by a year due to the pandemic. As another example, some Member States, especially those in Central and Eastern Europe, have been cautious in their support for some of the Commission's proposed increases in ambition. As Wurzel et al. note in Chapter 3 in this volume, Poland has emerged as a somewhat of a negative climate leader amongst the Visegrád states (which also include Hungary, Czechia and Slovakia). This group often agrees common stances regarding EU climate policy proposals far below the ambitions of most other Member States, with Poland's actions representing negative climate leadership that deviates from the ambitions of most EU states. For example, in December 2020, Poland was vocal in its opposition to elevating the EU's 2030 emissions target from 40 per cent to 55 per cent on a 1990 baseline, and a year previously had opposed the EU's net zero emissions target for 2050. Yet, Poland is much less economically developed than most Member States. Thus, this example demonstrates the complexity of labelling actors as negative climate leaders, despite instances of leading other states to oppose stronger goals. In sum, while the EGD is not without its weaknesses, its creation does represent an attempt at heroic/transformational leadership from the Commission, which has sought change through multiple types of leadership. The 'cognitive leadership' demonstrated by the EU through the actions leading up to – and including – the EGD may well be inadequate when considering the threats of climate change, but as we examine next, they have enabled the Union to increase its sway on the international stage.

4. THE EU IN INTERNATIONAL NEGOTIATIONS

The EU has played a significant role in the evolution of the global climate regime since its inception at the beginning of the 1990s (see Vogler, Chapter 10 in this volume). It presented itself from an early stage as a climate leader. To the extent that the EU has played a leadership role in global negotiations, this can be characterized primarily as entrepreneurial leadership, which entails effective diplomacy and negotiation (see above). Entrepreneurial leadership is related in important ways to, and underpinned by, cognitive, exemplary and particularly structural leadership: other things being equal, an actor's attempts at diplomacy and negotiation are likely to be more effective if that actor has a good story to tell (cognitive leadership), has a model of best practice to underpin its efforts (exemplary leadership), and has structural power resources at its disposal (structural leadership). Furthermore, and relatedly, the external context is likely to shape the opportunities for an actor to exercise entrepreneurial leadership. These factors have interacted in complex ways over the three decades in which the EU has sought to exercise leadership in global climate negotiations.

During the 1990s, EU global leadership on climate change was relatively limited. The EU sought to exercise cognitive leadership by announcing internal emissions targets in advance of the key negotiating moments of the 1990s, but this was limited by the fact that the EU had yet to develop a significant suite of domestic policies to back up its climate targets (see Vogler, Chapter 10 in this volume). It was the USA that shaped key design aspects of the Kyoto Protocol. Overall, the EU's limited attempts to exert cognitive, exemplary and entrepreneurial leadership were not very successful.

The 2000s were characterized by a shifting international landscape that shaped to a significant extent the opportunities for the EU to show global leadership on climate change. The decision by US President George W. Bush not to submit the Kyoto Protocol to the US Senate for ratification created an opportunity for the EU to step into the breach. The EU was central to the successful conclusion of negotiations on the implementation of the Kyoto Protocol in Marrakech in 2001, and its entry into force in 2005 (Vogler, Chapter 10 in this volume). EU entrepreneurial leadership in the global negotiations was underpinned to a greater extent by the progressive development of EU level climate policies, including in 2005, the launch of the EU Emissions Trading System (ETS), and in 2008/09, agreement on the 2020 Climate and Energy Framework, which developed the EU's cognitive and exemplary leadership over this period (see Vogler, Chapter 10 in this volume). However, the opportunities for EU structural leadership were progressively declining with its shrinking share of global GHG emissions and the rise of other major emitters, notably China and India (Torney, 2015), and the re-engagement of the US in global climate negotiations following the election of President Barack Obama in 2008. Partly because of these developments, the EU's attempts at entrepreneurial leadership at the 2009 Copenhagen climate change conference were largely unsuccessful (Bodansky, 2010: 240).

Due to its experience at the Copenhagen COP, and as mentioned earlier, in the early 2010s, the EU evolved into what Bäckstrand and Elgström (2013) characterized as a 'leadiator'. This role entails a more pragmatic approach to leadership that pays greater attention to the changing nature of global climate politics. The EU played a more central role getting the UNFCCC back on track at the 2010 COP in Cancun, but did so at the expense of the ambition of the goals it was seeking to achieve (Groen, Niemann and Oberthür, 2012). Over the following years and in the lead-up to COP21 in Paris, the EU and its Member States invested significantly in its capacity for climate diplomacy (Torney and Davis Cross, 2018). These efforts largely paid off, with a much more proactive role by the EU in the Paris negotiations compared with the Copenhagen negotiations. The EU was central to the creation of the so-called 'High Ambition Coalition', which played an important role in pushing for a more ambitious outcome in Paris (Dupont, Oberthür and Biedenkopf, 2018). However, the EU's approach also involved a moderation of its negotiating position to bring it more into line with the broader international context, and to take account of the continuing decline of the EU's structural power (Oberthür and Groen, 2018).

The post-Paris era has been characterized by significant international turbulence, with the election of populist leaders in key countries, such as Trump in the USA and Jair Bolsonaro in Brazil, a global pandemic from 2020, and the return of war on the European continent and heightened geopolitical tensions in 2022. These factors have all further complicated the context for EU international climate leadership. The EU's EGD, as discussed, constituted the EU's response to the need to strengthen ambition, including an increase of the Union's 2030 decarbonization target from 40 per cent to 55 per cent below 1990 levels, and a revision of the climate and energy framework to bring it into line with this strengthened 2030 target. At the postponed COP26 meeting in Glasgow in November 2021, some commentators characterized the EU as 'missing in action' (Mathiesen, 2021), while others suggested a continuation of its role as a pragmatic leadiator (Tosun and Jungmann, 2021). The EU succeeded in achieving many of its core objectives, including completion of the Paris 'rulebook', but was left disappointed by the last-minute weakening of language on coal – from phase-out to phase-down – in the Glasgow Climate Pact. Overall, COP26 left much to be done, including on climate

ambition and implementation, climate finance, and addressing the vexed issues of Loss and Damage (Anisimov et al., 2022).[4]

5. THE EU'S EXTERNAL CLIMATE GOVERNANCE

While the UNFCCC negotiations and agreements are at the core of international climate governance, the EU engages in a broader field of external climate governance. This broader field includes structural leadership based on the EU's market power, and its usage of extensive development cooperation and an external investment strategy called the 'Global Gateway', as well as entrepreneurial leadership through diplomatic outreach. As noted in Section 4, the EU's declining share of global GHG emissions reduces its issue-specific structural power in the negotiations: the less the EU is part of the problem, the less central it is in terms of making additional emission reduction commitments. Yet, the EU derives additional structural power from the size and attractiveness of its market, its financial resources, and low-carbon technological capabilities. While the EU's economic power also decreases relative to more rapidly growing economies such as China, this decline is less dramatic, and the EU remains the second-largest economy in the world. Pooling Member State and EU-level diplomatic resources, the EU has an expansive network of embassies/delegations and diplomats at its disposal to engage in entrepreneurial leadership.

The EU market is attractive for many companies and countries. With its almost 450 million consumers, the EU makes up a significant share of many non-EU companies' sales. This status gives the EU leverage over production that occurs outside of its borders (see Dobson, and Youngs and Lazard, Chapters 25 and 11 in this volume). There are two main tools that the EU uses in this regard. The first is legislation that determines certain product or process specifications, which are a precondition for selling the respective product or service on the EU market. The legislation applies to any party who is active in the EU market, regardless of whether it is an EU company or an exporter to the EU. One example is EU energy efficiency rules for a range of electronic products. Many of those products are produced outside EU borders but need to comply with EU rules since they are imported. In some cases, EU rules lead to product changes for other markets as well, since such harmony simplifies production processes, and investment in the research and development has been made already (Vogel, 1997). Since these external effects occur as a result of internal EU law, the lines between the EU's pioneership and its leadership are blurred and depend on the inbuilt intentionality of attracting external followers in addition to regulating the internal market. One example of how the EU intentionally uses (or proposes to use) its market power is the Carbon Border Adjustment Mechanism that is part of the EGD. Products from countries without a carbon price will be charged an extra levy to level the playing field with producers who comply with the EU Emissions Trading System (see Wettestad, Chapter 16 in this volume). The second tool consists of sustainability provisions in free trade agreements. As of 2020, the EU had concluded such agreements with 37 states, such as Japan, and since the 2010s, the EU has increasingly included sustainability clauses in those agreements. Since 2015, EU free trade agreements include a provision that commits the partners to adhere to the Paris Agreement.

Structural leadership can also result from development cooperation, external investments and capacity building. The EU has committed to using 30 per cent of its total 2021–2027 budget for climate-related expenditures (Rietig and Dupont, Chapter 17 in this volume). The

target for the previous budget (2014–2020) was 20 per cent. These commitments also apply to development cooperation. Since the EU jointly with its Member States is the largest donor globally, the mainstreaming of climate objectives can generate significant impact. This status enables the EU to use structural leadership in the many countries that it supports through development cooperation projects. Capacity building is a related activity. For example, the EU has financed capacity building projects in countries that are interested in adopting a domestic GHG emissions trading system, including China, South Korea and Kazakhstan (Biedenkopf et al., 2017). Through targeted support for establishing the necessary technical capacity to design and implement such a policy, but also through sharing lessons about the EU's own experience, the EU uses its structural power to support learning from the EU's pioneering ETS policy, combining of exemplary leadership with structural leadership.

After the failure of the 2009 Copenhagen UNFCCC COP, the EU recognized that it needed to rethink its climate diplomacy. Since 2011, the European Commission, the European External Action Service, and the Council of the EU have developed several climate diplomacy strategies and action plans that encompass a range of activities (Youngs and Lazard, Chapter 11 in this volume), including raising climate change at high-level political meetings such as the G7 and G20, and bilateral outreach to third countries. A network of more than 140 EU Delegations and offices serve as the EU's embassy equivalents around the world. In each of them a climate focal point – a member of staff who acts as contact point – is determined and a series of climate diplomacy activities are implemented by each Delegation, albeit with varying levels of intensity and frequency. Delegations execute *Démarches*, which are meetings with government representatives on certain climate-related topics, and also public diplomacy, such as exhibitions and newspaper op-eds (Biedenkopf and Petri, 2021). Those climate diplomacy activities support and foster various types of EU leadership, in particular exemplary and entrepreneurial leadership.

6. DISCUSSION AND CONCLUSIONS

Globally, the EU is a vital climate actor that has demonstrated – and continues to demonstrate – multiple styles and types of climate leadership, as well as instances of followership and failed leadership. We began by exploring the literature on climate leadership, and critically reflecting on the existing assumption that 'climate leaders' are always normatively positive. This assumption has hindered conceptual completeness; we encourage scholars to analyze the efforts by actors – across differing levels – to lead others away from greater ambition, for varying reasons, as instances of 'negative climate leadership'. For our analysis, we have explored the positive climate leadership trends of the EU across three areas. In the first section, through a case study analysis of the EGD, we discussed how the EU is seeking to demonstrate multiple types of climate leadership at once, particularly exemplary leadership, within a context of polycentric governance, such as through its Farm to Fork scheme and Climate Pact initiative, and since summer 2021, its Fit for 55 Package. As these nascent approaches mature, new research is welcomed of which strategies have succeeded, and which have not, and which sectors have yet to be tackled meaningfully at all within the EU.

Regarding the second section on the EU at international conferences, over 30 years of global climate negotiations have seen various ebbs and flows in EU leadership. The EU has progressively strengthened the basis for its engagement in global negotiations by enhancing its

domestic record on climate, thereby boosting its capacity for cognitive leadership, while at the same time bolstering its diplomatic capacity, thereby enhancing its ability to exercise entrepreneurial leadership. Its structural environmental power, and by extension, its capacity for both structural and entrepreneurial leadership, has been on a long-term downward trajectory as a result of global power shifts and related changes in the global distribution of GHG emissions (Biedenkopf, Dupont and Torney, 2022). Against this backdrop, EU international engagement on climate has evolved from a narrow focus on the formal UNFCCC process to a broader climate diplomacy strategy, as well as a moderation of its position, which can arguably be characterized as a move from a heroic to a more humdrum style of leadership, in an attempt to match better its approach to the broader global context. The extent to which this strategy is maintained and adapted during and following the COVID-19 pandemic and Russia–Ukraine conflict merits academic investigation.

Finally, regarding the EU's external climate governance beyond international conferences, since the failure of the 2009 Copenhagen climate conference, the EU has broadened its climate leadership strategy beyond the UNFCCC negotiations to a broader set of tools in support of and in addition to the negotiations. This approach includes the use of structural leadership through leverage derived from the EU's attractive market, free trade agreements, development cooperation, and external investment. The EU's global economic weight is declining less sharply than its GHG emissions and it still derives significant power for structural leadership, but with the rising power of economies such as China, in the long run, this source of leadership will decline. The EU's broader climate diplomacy also includes entrepreneurial leadership through its expansive diplomatic network. Active outreach can support the strengthening of other countries' climate plans under the Paris Agreement and foster learning from EU climate policy experiences (exemplary leadership). Resource constraints in the EU Delegations and the EEAS, however, hamper these efforts.

In sum, the EU's complexity affords it many opportunities to exert climate leadership, but an ongoing context of crisis and turbulence, as well as the difficulties inherent in guiding such an interconnected, multi-level global actor, also stymie this potential. The EU has been an ambitious climate leader to varying degrees over time, but it will need to maintain and elevate this performance in the coming years if its own targets – and those of its partners – are to be achieved.

NOTES

1. The support of the Economic and Social Research Council (ESRC) is gratefully acknowledged, having funded Paul Tobin via grant ES/S014500/1 during the writing of this chapter.
2. We thank Tim Rayner, Sebastian Oberthür, Kacper Szulecki and Ciara Kelly for their insights during discussions of this term.
3. There are slightly different emphases in the focuses of the two framings – the transactional and transformational framing by Burns (2003) emphasizes *how* leaders achieve their goals; Hayward (2008) focuses on the *impact* of his transactional/transformational styles (see Liefferink and Wurzel, 2017: 12). For the purposes of this chapter, the two notions of leadership styles are considered essentially synonyms.
4. According to the most cited definition, Loss and Damage refers to 'impacts of climate change that have not been, or cannot be, avoided through mitigation or adaptation efforts' (Shawoo et al., 2021). While economically developed countries have argued that finance to address Loss and Damage could come from existing climate funds, insurance schemes, humanitarian aid, or risk management,

many economically developing countries have called for dedicated financial mechanisms. At COP26, the European Union aligned with the United States in resisting calls for a dedicated Loss and Damage fund (Anisimov et al., 2021).

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Europe and the World:
A law review

UCLPRESS

Special issue: *Economic and Non-economic Values and Objectives in the EU's International Trade: Actors and Processes in Resolving Normative Tensions*

Article

Externalising Europe's energy policy in EU Free Trade Agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?

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How to Cite: A.-A. Marhold, 'Externalising Europe's energy policy in EU Free Trade Agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?' [2019] 3(*1*): 7. *Europe and the World: A law review* [18].
DOI: https://doi.org/10.14324/111.444.ewlj.2019.17.

Submission date: 19 July 2018; Acceptance date: 3 July 2019; Publication date: 29 July 2019

Peer review:
This article has been peer reviewed through the journal's standard double blind peer-review, where both the reviewers and authors are anonymised during review.

Abstract

It is no secret that while the European Union (EU) has taken up commitments to combat climate change under the United Nations Framework Convention on Climate Change Paris Agreement and its own 2020 and 2030 climate and energy package strategy, the Union continues to be heavily dependent on the import of fossil fuels from abroad. One may even say that this leads to a cognitive dissonance, i.e. the discomfort which ensues if one holds two contradictory values, with respect to the externalisation of the Union's energy and sustainable development policy. On the one hand, the EU aims to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself through the inclusion of specific chapters on Trade and Sustainable Development in the EU's Free Trade Agreements (FTAs) (standard since the 2011 EU-South Korea FTA). On the other, the EU realises

that it is imperative to secure the Union's security of energy supply, still largely guaranteed by fossil fuels. Therefore, the Union in parallel attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine Deep and Comprehensive Free Trade Agreement). This paper will explore the root causes of this cognitive dissonance and research what elements could contribute to ensuring more coherence in EU external energy policy. The objectives of sustainable development and security of supply are not necessarily contradictory per se. However, clearer delineations between the two objectives are necessary in EU external relations in general, and in the Union's FTAs more specifically. This also applies to relations between Member States and the Union in this area, as well as to the interactions between the relevant EU institutions tasked with energy, sustainable development and the environment.

Keywords: EU external relations law; EU Free Trade Agreements; EU energy policy; sustainable development; trade and investment law

1. Introduction

It is no secret that while the European Union (EU) has taken up commitments to combat climate change under the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement (hereinafter the Paris Agreement) and its own 2020 and 2030 climate and energy package strategies, the Union continues to be heavily dependent on the import of fossil fuels from abroad.[1] One may even say that this leads to a cognitive dissonance (i.e. the discomfort which ensues if one holds two contradictory values) with respect to the externalisation of the Union's energy and sustainable development policy. On the one hand, the EU aims to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself through the inclusion of specific chapters on Trade and Sustainable Development in the EU's Free Trade Agreements (FTAs) (standard since the 2011 EU-South Korea FTA).[2] On the other hand, the EU realises that it is imperative to secure the Union's security of energy supply, which is still largely guaranteed by fossil fuels.[3] Therefore, the Union in parallel attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA)).[4] Beyond that, the EU even goes as far as aspiring to include provisions that legally secure access to fossil fuel energy sources (mainly natural gas) in its FTAs with third countries (e.g. in the currently dormant, but nevertheless controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiations).[5]

It is therefore safe to say that the behaviour of the Union is, at a minimum, contradictory in attempting to reconcile these objectives. On the one hand, the EU is promoting sustainable development in its relations with third countries. On the other, it continues to be heavily dependent on imported fossil fuels, therefore actively attempting to secure the supply of polluting fossil fuels in its external relations. While the Union's current reliance on energy from imported fossil fuels is understandable from the viewpoint of short(er)-term energy security, it should strive to move away from them in the long run if it wants to 'practise what it preaches' in terms of sustainable development abroad.

The shared competences in the field of energy (Article 194 Treaty on the Functioning of the European Union (hereinafter TFEU)) and the environment (Article 191 TFEU) pose additional challenges in forming a coherent external strategy in this area.[6] The result is that the EU must constantly walk on a tightrope in two directions as regards its external energy policy: not only does it have to balance between promoting decarbonisation and securing its energy supply, it also has to ensure that the internal relationship between the Union and its Member States in this area is reflected adequately in its relations with third countries.

This paper will explore the root causes of the ensuing cognitive dissonance in EU external relations and suggest ways in which the EU can behave in a more uniform manner, accommodating both objectives in its relations with third countries. To this end it will also research three (types of) FTAs: the EU-Singapore FTA (2014), the EU-Ukraine DCFTA (2014) and the draft chapters of the TTIP. It should be pointed out from the outset that the objectives of sustainable development and security of supply are not contradictory per se. However, clearer delineations or coordination between the two objectives would favour EU external relations in general, and the EU's FTAs more specifically. Moreover, Member States and the Union would

[1] COP21 Paris Agreement: United Nations Framework Convention on Climate Change (UNFCCC), UN Doc FCCC/CP/2015/L.9/Rev.1 'Adoption of the Paris Agreement' (12 December 2015); See European Commission, DG Climate Action, '2020 Climate and Energy Package' and '2030 Climate and Energy Framework'; the EU imports almost 60 per cent of its fossil fuels from abroad, see Eurostat, Energy Production and Imports: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports#Imports> (accessed 1 March 2019).

[2] OJ L 127, 14 May 2011.

[3] European Commission, 'European Energy Security Strategy' COM (2014) 330 final.

[4] The EU-Ukraine Deep and Comprehensive Free Trade Agreement is part of the wider EU-Ukraine Association Agreement: European Commission, 'Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part' OJ L 161/3 (29 May 2014) (provisionally in force).

[5] European Commission, DG Trade, 'In focus: Transatlantic Trade and Investment Partnership' <http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm> and United States Trade Representative, 'Transatlantic Trade and Investment Partnership <https://ustr.gov/ttip> (accessed 1 March 2019).

[6] Article 191 (Environment) and Article 194 (Energy) of the Consolidated Version of the Treaty on the Functioning of the European Union, 2008 OJ C 115/47.

themselves benefit from more uniformity and coordination in this area, as would the EU institutions tasked with developing energy, sustainable development and environmental policy.

2. Europe's energy security and sustainable development ambitions: A balancing act

Several of the normative tensions alluded to in the introduction to this paper originate in the balancing act as regards the ongoing development of the EU's energy and sustainable development policy, which will be highlighted in this section. It becomes evident that there is a constant manoeuvring taking place between what are considered energy security and climate goals in the EU, requiring a trade-off between decarbonisation, energy security and competitiveness, while also considering the division of competences between the Union and the Member States.

The Union's ambitions in the field of energy and sustainable development are, at least in part, a reflection of the international sustainable development and climate commitments the EU has undertaken. In the framework of the United Nations, the EU and its Member States have committed to the 2030 Sustainable Development Goals (UN SDGs).[7] Several of these goals are directly relevant for energy and sustainable development (as the name itself indicates), such as Goal 7 (affordable and clean energy), Goal 11 (sustainable cities and communities) and Goal 13 (climate action).[8] Furthermore and more concretely, under Article 3 of the Paris Agreement, the Union has agreed to submit Nationally Determined Contributions (NDCs) on how it foresees reducing its emissions and keeping global temperature from increasing beyond 1.5 degrees as compared to pre-industrial levels.[9]

Apart from its climate commitments, there are other factors that determine the Union's policy in the area of energy, namely the Union's security of supply. In the context of the G20, of which the Union is part, the Leaders' Declaration following the 2017 Summit in Hamburg stated that the group is resolved to tackle common challenges to the global community, such as climate change and energy security.[10] In view of these international commitments, this section will briefly highlight the EU's internal policy concerning energy and sustainable development. It discusses the emphasis on each of these elements and the manner in which they are intertwined in EU law and policy in turn.

2.1. The Energy Union: An emphasis on security of supply

The EU shares its competences with the Member States in the area of energy. This shared competence flows from Article 4.2(i) TFEU. As this is what is known as a 'complementary' competence, both the Member States and the EU can develop national and, respectively, regional energy policy in parallel. Pursuant to Article 4(3) of the Treaty on the European Union (hereinafter TEU), the Member States and the Union have a mutual duty to *sincerely cooperate* with each other in this endeavour. This implies that although both the Member States and the EU may operate alongside one another, they should cooperate and coordinate with each other and not pursue policies that are contrary to their respective objectives.[11] Moreover, the primacy of EU law prescribes that in the event there is a conflict between Union law and the laws of a Member State, Union law prevails and that when the Union has taken action with regard to a particular issue Member States are prevented from taking action.

Since the Treaty of Lisbon, the EU has had in place a Union-wide energy policy: its legal basis can be found in Title XXI, Article 194 TFEU. This article, among others, sets out that in its energy policy, the EU shall aim to (a) ensure the functioning of the energy market; (b) ensure the security of supply of the Union; (c) promote energy efficiency and the development of renewables; and (d) promote the interconnection

[7] Note, the definition most commonly used to describe sustainable development is the one used in the Brundtland Report: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs' *Report of the World Commission on Environment and Development: Our Common Future* (Oxford University Press 1987).

[8] United Nations 2030 Sustainable Development Goals <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>/ (accessed 1 March 2019).

[9] Article 2 of the Paris Agreement (n 1).

[10] See G20 Germany 2017, 'G20 Leaders' Declaration – Shaping an Interconnected World' (Hamburg, 8 July 2017) 2.

[11] Article 4(3) of the Consolidated Version of the Treaty on European Union, 2010 OJ C 83/01 (hereinafter TEU).

of energy networks.[12] In this context, Article 194 TFEU also serves as the legal foundation for the plan that the EU unveiled in 2015: the so-called Energy Union Package, dubbed a 'Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy'.[13] Realising that it is crucial to have a coherent and forward-looking energy strategy, the Commission heralded the Energy Union as one of its top 10 priorities.[14] By means of this strategy, the EU intends to go beyond the mere completion of the single Internal Energy Market (IEM) and build a resilient Energy Union to provide its consumers (households and businesses) secure, sustainable, competitive and affordable energy, while simultaneously pursuing the bloc's climate policy targets.[15] The idea of the Energy Union is to attain a truly integrated energy market, beyond the national regulatory frameworks of the Member States, by ensuring a more competitive, efficient, sustainable and interconnected energy market.[16] The EU does not shy away from using unambiguous language in the founding document, proclaiming that Europe needs to make the right choices now, before it is too late to shift to a low-carbon economy.[17]

In light of the Union's history, it is rather remarkable that the concept of an Energy Union only saw the light of day in 2015: the origins of the EU in the early 1950s can de facto be traced back to energy policy. The birth of the European Coal and Steel Community (hereinafter: ECSC) in 1952 is widely accepted to have been 'the first step in the federation of Europe'.[18]

The Energy Union is arguably the biggest EU energy project since the ECSC. One of the underlying reasons given for the creation of the Energy Union at present are the deteriorating relations with Russia in the East, as well as the EU's obligation to meet climate targets and transition to a decarbonised economy.

The Energy Union strategy is built around five interlinked dimensions: (1) energy security, solidarity and trust; (2) a fully integrated European energy market; (3) energy efficiency contributing to moderation of demand; (4) decarbonising the economy; and (5) research, innovation and competitiveness.[19] To some extent, we can discern the origins of a cognitive dissonance here: while one can understand that these pillars are interlinked and complement each other, it is also obvious that all five dimensions cannot be simultaneously executed to their full extent and that a trade-off between them is needed. For instance, the first two dimensions emphasise guaranteeing energy security for the Union, to be achieved through fully integrating Europe's energy markets, while energy efficiency and decarbonisation of the economy, linked to managing energy resources in a sustainable manner, only follow later in the list of priorities (dimensions 3 and 4). An explanation for this may be that ensuring energy security for European citizens is considered a more urgent matter, while it is assumed that transitioning to a more efficient, decarbonised economy can simultaneously take place, albeit more 'behind the scenes'. This assumption can be deceptive, however, as it could also be argued that transitioning to cleaner and more efficient energy sources will increase the EU's energy security and create less dependency on fossil fuels from abroad.

While the term 'energy security' does not necessarily refer to fossil fuels, the reality is that the Union imports more than half of its energy from abroad, most of it being fossil fuels (coal, petroleum and natural gas) from Russia.[20] Hence, when discussing the Union's energy security, the association with fossil fuels is unavoidable in practice. Interestingly enough, however, the concept of 'energy security' in and of itself

[12] Article 194(1) TFEU.

[13] See DG Energy, 'Energy Security Strategy' <https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy> (accessed 18 July 2019) and European Commission, 'Energy Union Package – Framework Strategy for a Resilient Energy Union with a Forward-looking Climate Change Policy' COM (2015) 080 final.

[14] ibid.

[15] Energy Union Package (n 13) 2.

[16] The Energy Union is a political strategy that includes but goes beyond the Energy Package legislation liberalising the EU Internal Energy Market: See EU Clean Energy Package Proposals <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition> (accessed 1 March 2019).

[17] Energy Union Package (n 13) 3.

[18] Schuman Declaration of 9 May 1950 <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> (accessed 1 March 2019).

[19] Energy Union Package (n 13) 4.

[20] See Eurostat, Energy Production and Imports (n 1).

is not clear cut. No legally binding definition of 'energy security' exists, either on the international level, or in the context of EU law.[21] In the words of the EU itself:

> DG Energy undertook steps to ensure that the assessment of security of supply becomes more quantifiable and transparent. *This overview shows that although there is no clear definition at the EU level of what security of supply means*, there is a clear focus on measures to establish security of supply.[22]

The status quo therefore is that, although a vast number of academics and policymakers discuss and try to frame the definition of 'energy security' and 'energy security of supply' legally or otherwise, no clear consensus on its meaning exists.[23] The most straightforward point of reference then is the International Energy Agency (hereinafter IEA), which describes the concept of 'energy security' in the broadest sense as 'the uninterrupted availability of energy sources at an affordable price'.[24] The United Nations offers an additional description and characterises 'energy supply security' as 'the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices'.[25] One can further distinguish two dimensions of energy security: long-term energy security, which implies timely investments taking into account sustainable development needs, and short-term energy security, implying that the system should react adequately to sudden changes in supply and demand.[26]

Despite the fuzziness of the concept of energy security, it is commonly understood that energy security covers elements of (i) a reliable supply that is (ii) accessible, and (iii) affordable. In the opinion of the author, a fourth, overarching element should be added, which is that the supply should be *sustainable* for the long term. It follows that by guaranteeing energy security, energy markets should be resilient in the event of shocks (e.g. in the European context, think of the recurring gas transit disputes between Russia and Ukraine that took place in the 2000s, which affected a great number of EU Member States directly).[27] In essence, energy security must go hand in hand with a sustainable energy supply, one that can be guaranteed for future generations (echoing the definition of sustainable development mentioned above).[28] In this sense, the sustainability aspect is inseparable from the concept of energy security.

Despite the lack of a legal definition at EU level, the Union clearly must have been convinced that the concept of energy security was important enough to elaborate on a European Energy Security Strategy, preceding its Energy Union Package.[29] This strategy was accompanied by an in-depth study of Europe's energy security.[30] Additionally, the earlier and more detailed Security of Gas Supply Regulation

[21] The EU in its energy security strategy in so many words confirms that there is no legal definition of energy security on the European level, see EC, Commission Staff Working Document, 'In-depth Study of European Energy Security', SWD (2014) 330 final, 166, accompanying document EC, 'European Energy Security Strategy' (n 3).

[22] ibid (emphasis added).

[23] See e.g. Energy Charter Secretariat, 'International Energy Security – A Common Concept for Energy Producing, Consuming and Transit Countries' (Energy Charter Secretariat, Brussels 2015) 10ff; The Council of European Energy Regulators (CEER), 'Energy Regulation and Security of Supply – The European Regulators' Approach' presentation of 8 March 2010 www.ceer.eu (accessed 18 July 2019); I Dreyer and G Stang, 'What Energy Security for the EU' [2013] European Union Institute for Security Studies 1; and generally J Lilliestam and A Patt, 'Conceptualising Energy Security in the European Context' (2012) SEFEP Working Paper 2012-4 and R Metais, 'Ensuring Energy Security in Europe: The EU between a Market-based and a Geopolitical Approach' (2013) College of Europe EU Diplomacy Paper 03/2013.

[24] See International Energy Agency, 'What is Energy Security?' <https://www.iea.org/topics/energysecurity/whatisenergysecurity/> (accessed 1 March 2019).

[25] Energy Charter Secretariat (n 23) 113.

[26] ibid; also see International Energy Agency, *World Energy Outlook 2016* (IEA 2016) 86.

[27] See e.g. on this generally A Marhold, 'The Russo-Ukrainian Gas Disputes, the Energy Charter Treaty and the Kremlin Proposal – Is There Light at the End of the Gas Pipe?' (2011) 3 Oil, Gas & Energy Law Journal (OGEL) Special issue on Cross-Border Pipelines.

[28] Supra note 7.

[29] European Commission, 'European Energy Security Strategy' (n 3).

[30] European Commission, Commission Staff Working Document, 'In-depth study of European Energy Security' (n 21). In brief, the European Energy Security Strategy consists of the following key elements: 1. Immediate actions aimed at increasing the EU's capacity to overcome a major disruption; 2. Strengthening emergency/solidarity mechanisms including coordination of risk assessments and contingency plans; and protecting strategic infrastructure; 3. Moderating energy demand; 4. Building a well-functioning and fully integrated internal market; 5. Increasing energy production in the European Union; 6. Further

and Directive (2010) and the Security of Electricity Supply Directive (2006) set out more detailed rules in these specific areas.[31] The Security of Gas Supply Regulation, for instance, actively advocated for developing ties with third countries:

> The diversification of gas routes and of sources of supply for the Union is essential for improving the security of supply of the Union as a whole and its Member States individually. Security of supply will depend in the future on the evolution of the fuel mix, the development of production in the Union and in third countries supplying the Union, investments in storage facilities and in the diversification of gas routes and of sources of supply within and outside the Union including Liquefied Natural Gas (LNG) facilities.[32]

The dimension of energy security as presented in the Energy Union Package builds on this 2014 European Energy Security Strategy.[33] The EU, in creating an Energy Union, plans to attain this energy security, solidarity and trust by the following means:

First, by diversifying supplies, meaning energy sources, suppliers and routes.[34] One of the key elements here is the EU's interest to explore the full potential of liquefied natural gas (hereinafter LNG).[35] This implies an increased amount of trade in and imports to Europe of LNG. For these reasons, the EU is developing a comprehensive strategy for LNG and its storage, including linking LNG access points to the internal market.[36] As part of this, the Commission is working to remove obstacles to LNG imports from the US and other LNG producers. Second, the EU envisions an ever-closer cooperation of Member States, Transmission System Operators and the energy industry on security of supply. The rationale here is that, in the event of a tight supply or a disruption, Member States can rely on their neighbours. Third, the strategy proposes a stronger role for the EU in global energy markets by contributing to the improvement of energy governance with a view to promoting competition and transparency. Here, the main tool that the EU intends to use is EU trade policy: it aims to include energy-specific provisions in trade agreements with its partners.[37] In the Commission's words, it 'will seek as a priority to negotiate energy specific provisions contributing to the energy security, notably access to resources, and sustainable energy goals of the Energy Union'.[38] Especially countries that are important from a security of supply perspective are singled out here. The strategy explicitly mentions the United States (as well as Canada). The ambition to negotiate a separate energy chapter in TTIP was a quintessential example hereof, as are the energy provisions of the already concluded EU-Ukraine DCFTA and those in the EU-Singapore FTA.[39] Fourth, the EU wants to strengthen its energy security by promoting more transparency over gas supply to the Union. In other words, the Commission demands more insight into intergovernmental agreements that Member States conclude with third countries which regulate the (long-term) buying of gas. The Union is of the view that if it is involved in negotiations from an early stage of the process and manages to speaks with one voice, it is easier to more effectively move forward since it has proven to be more difficult to renegotiate such agreements in the past.[40]

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developing energy technologies; 7. Diversifying external supplies and related infrastructure; 8. Improving coordination of national energy policies and speaking with one voice in external energy policy.

[31] Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC Text with EEA relevance; Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (Text with EEA relevance).

[32] Security of Gas Supply Regulation (n 31) point 7.

[33] 'European Energy Security Strategy' (n 3) and Energy Union Package (n 13).

[34] Energy Union Package (n 13) 4.

[35] ibid, 5.

[36] ibid.

[37] Energy Union Package (n 13) 6.

[38] ibid.

[39] EU-Singapore Free Trade Agreement, Authentic text as of May 2015; EU-Ukraine Association Agreement (n 4) and European Commission, DG Trade (n 5) and United States Trade Representative (n 5).

[40] Energy Union Package (n 13) 6.

2.2. Europe's 2020 and 2030 climate and energy strategy: An emphasis on sustainable development

Apart from the Energy Union, with its heavy focus on energy security, the EU further has its own, Union-wide climate and energy strategy in place. This policy is based on both the energy (Article 194 TFEU) as well as on the environmental (Article 191 TFEU) competences of the EU. As is the case with energy, EU environmental policy is based on a shared competence and is set out in Article 191 TFEU. This implies that the Member States may only exercise their competences to the extent that the Union has not exercised its competences and are not allowed to adopt legislative measure that may conflict with or hinder the execution of those that are undertaken at EU level. Article 191 TFEU serves as the basis for the Union's policies in the area of sustainable development, although a connection to Article 194 TFEU on energy policy remains: there is a relationship between the two areas, sometimes leading to overlap or even potential tension between the two articles. One could think of EU climate targets, for example, including goals for shares of renewable energy in Member States' energy mix and how these may arguably be at odds with the energy mix carve-out of Member States under Article 194(2) TFEU.[41] Notwithstanding this fact, the emphasis of the 2020 and 2030 strategies seems to be on sustainable development rather than energy security only.

The Union's 2020 strategy is a policy that inter alia implements the objectives set out in paragraph 1 of Article 194.[42] By 2020, the EU aims to reduce its emissions by at least 20 per cent. In addition, the objective is to reach a 20 per cent share of renewables in the energy mix (including 10 per cent in the transport sector) and achieve energy savings of at least 20 per cent.[43] These objectives combined are known as the 20/20/20 targets. The Union hopes to meet its objectives by setting out five priorities: (1) accelerating investment in energy efficiency; (2) building a pan-European energy market (overlapping objective with the Energy Union); (3) protecting consumer rights in the energy sector; (4) accelerating the deployment of low-carbon technologies; and (5) pursuing good relations with the EU's external energy suppliers and transit countries.[44] While the stress is on sustainable development, the emphasis of the external dimension is on having good relations with third countries in the sphere of energy. This element is thus explicitly taken up in both the Energy Union strategy, as well as the EU's own energy and climate strategy.

The next target on the horizon is the 2030 strategy, where the EU plans to go beyond those goals envisaged for 2020: it includes a 40 per cent cut in greenhouse gas emissions compared to 1990 levels; a 27 per cent minimum share of renewables in the energy mix; and a 27 per cent increase in energy efficiency and savings.[45] To meet these objectives, the EU aims to reform its emissions trading scheme (ETS), focus further on diversifying energy supplies and increase interconnection in the Union, as well as putting in place a new governance system for sustainable energy.[46]

The ambitious targets set out in both the Energy Union strategy and the Climate and Energy strategy cannot be met without acknowledging the importance of the external dimension from the start. In both strategies, the diversification of energy supplies and good relations with the EU's key suppliers are mentioned as a priority. However, it must be acknowledged that both strategies have different points of gravity, which are sometimes hard to reconcile. While the Energy Union focuses on integrating markets and guaranteeing security of supply, the 2020 and 2030 strategies have a different primary goal: to increase the share of renewables and reduce harmful CO_2 emissions. How exactly the Energy Union and the 2020 and 2030 strategies relate to each other remains a point of discussion: although the Energy Union strategy remains a political strategy at present, the idea is that a legal framework will form its foundations in the future. It is conceivable that the two points of gravity of these two major energy and climate strategies of the EU point to the root cause of the ensuing balancing act between furthering climate

[41] See on the legal interaction between EU environmental and energy policy, for instance, T Sveen, 'The Interaction between Article 192 and 194 TFEU' in *EU Renewable Energy Law: Legal Challenges and Perspectives*, Scandinavian Institute of Maritime Law Yearbook 2014 (Oslo University) 157ff.

[42] See DG Climate Action, 2020 Climate and Energy Package (n 1).

[43] ibid.

[44] ibid.

[45] See DG Climate Action, 2030 Climate and Energy Framework (n 1).

[46] ibid.

and energy security goals. The Union must constantly decide how to reconcile two objectives: importing fossil fuels to guarantee short-term energy security or decarbonising the economy to warranty long-term energy security.

3. Externalising internal goals: Sustainable development and energy chapters in EU FTAs

Despite the fact that the 2020 and 2030 strategies are aimed at decreasing the EU's dependence on fossil fuels, the Union would presently not be able to function without fossil fuel imports from abroad. While the EU must live up to the climate commitments it undertook under the UN SDGs and the Paris Agreement, as well as under its own climate and energy strategies, the fact remains that more than half of the energy the EU consumes is imported from abroad.[47] At least 90 per cent of its crude oil is imported, as well as 60 per cent of its natural gas, making the EU one of the leading importers of these fuels. Some EU Member States rely completely on one country (e.g. on Russia for their natural gas) for their energy supply.[48] It is therefore understandable that strengthening and guaranteeing energy security is a top priority for the EU. Nevertheless, it is just as important to acknowledge that the key is to diversify away from fossil fuels in the long run and ensure that the Union is energy efficient and can (fully) rely on renewable energy in the future. This objective seems to be taking a backseat at present, which is reflected in the Union's external relations, for example in the energy and raw materials chapters that the EU is concluding in its FTAs.

This arguably is the cause of the cognitive dissonance with respect to the externalisation of the Union's energy and sustainable development policy: on the one hand, the Union promotes sustainable development and climate change mitigation in its FTAs with third countries, on the other it ensures that it has an abundant supply of fossil fuels. One could argue that this clashes with the objectives of sustainable development, at the very least in the long term. The following section will highlight some of the relevant chapters in EU FTAs to expose this dissonance with a view to suggesting how to proceed in a more coherent manner in the area of energy and climate policymaking in the EU.

The EU acts externally to the extent it has competence to act internally, the capacity for which is governed by the principle of conferral (Article 5 TFEU). This article states that the Union shall act within the powers conferred on it by the Member States.[49] Although conceived from the outset, common commercial policy became an exclusive EU competence only in the Lisbon Treaty, taken up in Articles 206 and 207, Part V, Title II TFEU. Most, if not all, 'new-generation' bilateral EU FTAs in place or under negotiation, however, go well beyond mere trade and common commercial policy. In addition to the classic provisions on the reduction of customs duties and non-tariff barriers in the field of goods and services, these agreements also contain chapters on other relevant trade-related matters, such as intellectual property protection, investment, public procurement, competition and, last but not least, sustainable development and energy. Evidently, not all of the topics covered in EU FTAs necessarily fall within the exclusive competence of the EU and may be shared. This implies that some (draft) chapters of current EU FTAs may pose challenges in the area of competences and cannot be concluded by the EU alone, requiring approval of the FTAs by EU Member States separately.[50]

This was clarified in CJEU Opinion 2/15 on the EU-Singapore FTA.[51] The Commission had submitted a request to the Court of Justice to determine whether it had the exclusive competence to

[47] Paris Agreement (n 1); See DG Energy, 'Energy Security Strategy' <https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy> (accessed 1 March 2019) and European Commission, *Energy Union Package – Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* (European Commission 2015) 2.

[48] ibid.

[49] Article 5 TFEU. The Union is to do so in accordance with Chapter 1 of Title V TEU, Article 205 TFEU; see on the existence of EU external competence in particular, B van Vooren and R Wessel, *EU External Relations Law – Texts, Cases and Materials* (Cambridge University Press 2014) Chapter 3, 'The Existence of EU External Competence'.

[50] See Court of Justice of the European Union (hereinafter CJEU) (Request for an Opinion pursuant to Article 218(11) TFEU – Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore – Allocation of competences between the European Union and the Member States) Opinion Procedure 2/15, Opinion of the Court (16 May 2017); note, however, that the Singapore FTA is now split into two agreements (EU only and mixed) – this is likely to be the EU's strategy in the future.

[51] ibid.

sign the Agreement itself. The Court concluded that this was not the case for the EU-Singapore FTA as some of the provisions in the Agreement fell into the area of shared competences (e.g. Investment and Investor-State Dispute Settlement) and therefore the whole Agreement could only be concluded by the EU and the Member States acting together. As regards chapters in the Agreement on energy generation from non-fossil fuels and sustainable development, however, the Court decided that they were within the exclusive competence of the Union.[52] This can be understood from the perspective that these chapters are assumed only to cover the trade-related aspects of energy and the environment. It remains doubtful, however, whether the argumentation of the Court can by definition be extended to all chapters on energy and raw materials in future EU FTAs, as they may vary in their set-up and goals, and can cover non-trade-related aspects of energy and environmental issues.

With this in mind, the section will compare the chapters relevant for sustainable development and energy in recently concluded FTAs (Singapore and Ukraine), as well as a draft chapter in the framework of TTIP negotiations. It will examine the energy chapters in more depth as, unlike the chapters on sustainable development, they are not standardised.

3.1. The sustainable development dimension: Chapters on trade and sustainable development and renewable energy generation in EU FTAs

3.1.1. Trade and sustainable development chapters in EU FTAs

The EU wishes to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself, for example, through the inclusion of specific chapters on clean energy (discussed below) and the by-now standardised chapters on sustainable development in the EU's FTAs (e.g. in the EU-Singapore FTA).[53] As the Commission itself phrases it, the EU commits itself to a responsible trade and investment policy as an instrument to implement the UN SDGs.[54] For this reason, the EU has started to include by default chapters on Trade and Sustainable Development (TSD) in its 'new-generation' bilateral FTAs. The first time such a chapter was included was in the 2011 EU-South Korea FTA, which is in its eighth year of implementation in 2019.[55] Other TSD chapters in force are taken up in agreements with Central America and South American countries such as Colombia and Peru, in addition to those taken up in FTAs with the European Neighbourhood (Georgia, Moldova and Ukraine).[56] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) also includes a chapter on TSD, as well as those FTAs that are currently under negotiation.

The existing TSD chapters are based on International Labour Organization (ILO) conventions and Multilateral Environmental Agreements (MEAs).[57] The chapters seek to promote an effective implementation of these agreements, creating a level playing field to not lower environmental standards for the purpose of improving trade and attracting investments, and ensuring the sustainable management of natural resources.[58] TSD chapters in EU FTAs reflect these values through the inclusion of provisions on multilateral labour standards and agreements, MEAs, trade favouring sustainable development, trade in forest products, trade in fish products, upholding levels of protection, review of sustainability impacts, civil society institutions, institutional and monitoring mechanisms, and cooperation on TSD.

The implementation period of the chapters is relatively short, and provisions in EU TSD chapters in FTAs are binding and subject to dispute settlement. The rationale is to ensure transparency and make 'real' progress in these areas and not limit them to lip service. Nevertheless, the Commission is also

[52] Opinion 2/15, paras 147–63: the Court finds that the objective of sustainable development now forms an integral part of the common commercial policy of the EU and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection.

[53] EU-Singapore FTA (n 39).

[54] DG Trade, Non-Paper of the Commission Services, 'Trade and Sustainable Development Chapters in EU Free Trade Agreements (FTAs)' (Brussels, 11 July 2017) 1.

[55] EU-South Korea FTA (n 2).

[56] Respectively OJ L 346, 15 December 2012; OJ L 354, 21 December 2012; OJ L 354, 21 December 2012; OJ L 261, 30 August 2014; OJ L 260, 30 August 2014; OJ L 161, 29 May 2014.

[57] DG Trade Non-Paper (n 54) 2.

[58] ibid, 2–3.

studying ways in which to improve the effectiveness of TSD chapters further by exploring other options. One of the possibilities would be to have in place a more assertive partnership on TSD, involving an upgraded partnership for enhanced coordination and joint action with Member States, the European Parliament, international organisations and trade partners. It would also mean making pervasive use of the TSD dispute settlement mechanism, where leverage could be applied in a more systematic way.[59] Another option would be to include a sanction mechanism, as is currently partly in place in the CETA. This would essentially entail the application of sanctions in case of non-compliance impacting trade or investment between the countries.[60]

This practice demonstrates that the EU takes the inclusion of extensive TSD chapters very seriously in its FTAs. The basis for including these chapters is, in the Commission's own words, the UN SDGs. The chapters include provisions on recognising 'the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems' and ensuring that parties 'reaffirm their commitment to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'.[61] One novel and progressive example of how the Union takes into account multilateral environmental commitments in this respect is the chapter on 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation' taken up in the EU-Singapore FTA, as illustrated below. This is a prime case where the EU has focused on the sustainable development side of energy in its international economic relations.

3.1.2. Trade and renewable energy: The EU-Singapore FTA (not yet in force)

The EU-Singapore FTA was concluded on 17 October 2014 and is currently pending ratification on the side of the EU and its Member States, taking into account CJEU Opinion 2/15.[62] Singapore is the biggest trade partner of the EU in the region of the Association of the Southeast Asian Nations (ASEAN).[63] Chapter 7 is entitled 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation'. The chapter is particularly innovative as it covers not only energy in general, but more specifically energy with a focus on sustainable development and climate change mitigation. Additionally, it approaches the theme of renewable energy from a comprehensive trade and investment angle, rather than considering them as completely separate issues. This implies that certain topics, such as energy, are better understood if dealt with in a more holistic and comprehensive manner. The chapter is progressive in that, among other things, it explicitly addresses the need to move away from fossil sources, as set out in the Preamble to the chapter:

> In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and *sustainable non-fossil sources*, particularly through facilitating trade and investment. To this effect, the Parties shall cooperate towards removing or reducing tariffs as well as non-tariff barriers and fostering regulatory convergence with or towards regional and international standards.[64]

The chapter consists of seven articles, most of which contain 'General Agreement on Tariffs and Trade (hereinafter: GATT)-plus'-type commitments on trade and investment in renewable energy. The obligations set out in the chapter apply to all measures that may affect trade and investment between the parties related to the generation of energy from renewable and sustainable non-fossil sources, such as wind, solar, aero thermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases, but not to the products from which energy is generated

[59] ibid, 6–7.

[60] ibid, 7.

[61] e.g. Article 292 paras 1 and 2, Chapter 13 of the EU-Ukraine DCFTA (n 4).

[62] See European Commission, Trade, Countries and Regions, Singapore at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/> (accessed 1 March 2019).

[63] The Association of the Southeast Asian Nations (ASEAN) <www.asean.org>.

[64] EU-Singapore FTA (n 39) Chapter 7: 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation' (emphasis added).

(Article 7.3(1)).[65] To prevent potential conflict with other parts of the Agreement, the FTA sets out in Article 7.3(3) that the other provision of the Agreement prevail.

There are five main principles set out in the chapter that parties to the Agreement have to adhere to:

(a) refraining from using local content requirements;
(b) refraining from local partnership requirements;
(c) ensuring that procedures concerning the authorisation, certification, etc, are applied in a non-discriminatory, objective and transparent manner;
(d) ensuring that any administrative charges in connection with the importation of goods and provision of services are complaint with the rules of the overall Agreement; and
(e) guaranteeing that the terms, conditions and procedures for the connection and access to electricity transmission grids are transparent and non-discriminatory.[66]

Article 7.5 of the FTA sets out rules on non-tariff barriers for the parties in their trade in products for the generation of energy from renewable and sustainable non-fossil sources.[67] It prescribes that in trading such products, the EU and Singapore have to use international standards as a basis for their technical regulations.[68] Moreover, parties are encouraged to include environmental performance in their technical regulations.[69]

Finally, Article 7.6 of the Agreement allows parties to invoke general exceptions that are present throughout the whole Agreement (e.g. Articles 2.14 and 8.62) and which cannot derogate from the exceptions provided for in the World Trade Organization (hereinafter WTO) Agreements.[70]

All in all, we can conclude that although the obligations are not extensive and particularly far reaching, this chapter of the EU-Singapore FTA nevertheless elevates the current standard for the regulation of renewable energy in EU FTAs. Not only does it firmly commit to the effort of eliminating greenhouse gas emissions, it also, as mentioned before, approaches (clean) energy from a more integrated trade and investment perspective. A similar chapter has been included in the FTA with Vietnam (not yet in force).[71]

3.2. The energy security dimension: Chapters on energy and raw materials in EU FTAs

Somewhat paradoxically, however, the very same FTAs that include chapters on TSD include (draft) chapters on removing discriminatory practices in fossil fuel trade and access to fossil energy supplies (arguably unsustainable in connection with their carbon intensity). Considering the EU's own international climate and environmental commitments and internal policies, one could assert that negotiating access to fossil fuels that should be as cheap and abundant as possible is, at minimum, in tension with fulfilling the Union's obligations under the chapters on TSD and international climate commitments. Following this assertion, the subsections below examine the chapters on energy and raw materials that emphasise the energy security aspect and which the EU has taken up or is currently negotiating in its FTAs: the energy-specific chapter in the EU-Ukraine DCFTA and a draft chapter from TTIP negotiations.

As explained in the previous section, the EU realises that it is imperative to secure energy supply for its citizens. For this reason, the EU in its FTAs, in parallel to TSD chapters, attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine DCFTA).[72] Beyond that, the EU even goes as far as attempting to include provisions that legally secure access to fossil fuel energy sources (mainly natural gas) in its FTAs with third countries (e.g. in the ongoing, yet currently dormant, EU-US TTIP negotiations). These chapters are discussed in turn below.

[65] ibid, Article 7.3(1).
[66] ibid, Article 7.4 (Principles).
[67] ibid, Article 7.5(1).
[68] Especially the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) are considered to be relevant international standards and are particularly encouraged.
[69] EU-Singapore FTA (n 39) Article 7.5(2).
[70] ibid, Article 2.14 sets out exceptions for the trade in goods, Article 8.62 does the same for trade in services.
[71] EU-Vietnam FTA (signed on 30 June 2019) Chapter 14; see 'European Commission, Trade Policy in Focus, EU-Vietnam Agreement' <http://ec.europa.eu/trade/policy/in-focus/eu-vietnam-agreement/> (accessed 18 July 2019).
[72] EU-Ukraine DCFTA (n 4).

3.2.1. EU-Ukraine DCFTA (provisionally in force)

The EU-Ukraine DCFTA is part of the larger Association Agreement that the EU concluded with Ukraine.[73] It was signed on 27 June 2014 but has not yet entered into force as it is still pending ratification in some EU Member States.[74] Due to security, political and economic challenges faced in the region, the active implementation of the DCFTA was postponed for 2016.[75] Nevertheless, the Agreement is provisionally in force as of 1 January 2016.

Notwithstanding the above, Chapter 11 of the DCFTA, entitled 'Trade-Related Energy', is a prime example of a highly evolved FTA as far as energy is concerned. Unlike the EU-Singapore FTA, however, its focus is not on renewable energy. Rather, the chapter clarifies outstanding issues in the more traditional energy field of fossil fuels and electrical energy. We can understand this more thorough regulation of the trade-related aspects of the traditional energy sector between the EU and Ukraine also from the viewpoint of Ukraine being part of the Energy Community Treaty, by means of which the EU extends its internal energy acquis to third countries.[76] In addition to this, the chapter's underlying rationale was clearly to guarantee an enhanced security of supply in the form of fossil fuels for the EU.

The chapter is comprised of 12 articles that centre around issues of dual pricing, transit, transport and quantitative restrictions. Chapter 11 provides clear definitions of previously ambiguous terms in the context of trade-related energy issues. It describes 'energy goods', for instance, within the context of the Agreement as natural gas, electricity and crude oil, and explicitly includes their respective Harmonised System codes.[77] What is more, the definition of 'fixed infrastructures', such as gas storage facilities and gas and electricity grids, is taken over from the 2003 EU Gas and Electricity Directives.[78] Last but not least, 'transit' and 'transport' of energy is implied to cover the transit and transportation of energy goods though fixed infrastructures and pipelines, including oil.[79]

Articles 269–271 of Chapter 11 form its centre of gravity and prohibit explicitly any forms of dual pricing and related discriminatory measures when trading energy. Article 269(1) prescribes that the price of gas and electricity supply shall be determined on the basis of supply and demand only, although parties are allowed to regulate for the purposes of 'general economic interest'.[80] If parties do decide to regulate in this area, they have to ensure that price regulations and their calculations are published prior to their entry into force.[81]

Dual pricing (the sale on the domestic market at far below global market prices, compared to high export prices abroad) is prohibited altogether by means of Article 270.[82] This 'GATT-plus' style commitment can be seen as a very clear stance on the practice, and in line with the EU stance on dual-pricing policies of the past decades.[83] Although the prohibition does not link dual pricing with subsidisation directly, as is often the case in WTO debates, it does so implicitly by including all measures that may result in dual pricing: '. . . neither Party or a regulatory authority thereof, shall adopt or maintain

[73] EU-Ukraine Association Agreement (n 4).

[74] Only after all EU Member States have adopted/approved the Association Agreement will it enter into force.

[75] European Commission, DG Trade, 'Ukraine' <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/> (accessed 1 March 2019).

[76] Energy Community Treaty: 'Treaty Establishing the Energy Community Treaty' [2006] OJ L 198, p. 18.

[77] EU-Ukraine DCFTA (n 4) Chapter 11: Trade-Related Energy, Article 268(1); The Harmonised System Convention: (Harmonised Commodity Description and Coding System), 14 June 1983, 1503 UNTS 167 is the system according to which all schedules are structured, See World Customs Organization, <http://www.wcoomd.org> (accessed 1 March 2019).

[78] EU-Ukraine DCFTA (n 4) Article 268(2) and the 2003 European Commission Gas and Electricity Directives: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37; and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57.

[79] EU-Ukraine DCFTA (n 4) Article 268(3) and (4).

[80] ibid, Article 269(2).

[81] ibid, Article 269(3).

[82] ibid, Article 270 (Prohibition of Dual Pricing).

[83] A Marhold, *Fossil Fuel Subsidy Reform in the WTO: Options for Constraining Dual Pricing in the Multilateral Trading System* (ICTSD 2017) 6–9.

a measure resulting in a higher price for exports of energy goods to the other Party than the price charged for such goods when intended for domestic consumption'.[84]

The same applies with respect to customs duties and quantitative restrictions, which are prohibited unless they are justified on grounds of public policy or public security; protection of human, animal or plant life or health; or the protection of industrial and commercial property.[85] It goes without saying that such restrictions or measures cannot constitute a means of arbitrary discrimination or a disguised restriction on trade between the parties.

Considering the fact that Ukraine lies in a geopolitically sensitive region, especially as far as the transit of energy is concerned, Chapter 11 could not do without rules on energy transit and the transportation of energy.[86] To avoid any ambiguity, the drafters of Article 272 wanted to ensure as broad a coverage of transit as possible in the article. For that reason, the principle of freedom of transit, enshrined in the rules of both the GATT and the Energy Charter Treaty (hereinafter: ECT) were included.[87] The article reads as follows:

> The Parties shall take the necessary measures to facilitate transit, consistent with the principle of freedom of transit, and in accordance with Article V.2, V.4 and V.5 of GATT 1994 and Articles 7.1 and 7.3 of the Energy Charter Treaty of 1994, which are incorporated into and made part of this Agreement.[88]

This article combines the relevant transit provisions of both the GATT and the ECT, including GATT Article V as covering fixed infrastructures.[89] It adds to that the obligations on transit set out in Article 7 of the ECT that go beyond those in the GATT, as the ECT provision was specifically tailored to deal with gas pipelines. By combining both relevant articles from both treaties, the article mitigates the uncertainty of the extent of coverage of energy transit in the EU-Ukraine DCFTA. That being said, both the EU and Ukraine are parties to the WTO and the ECT, and in that sense the article merely summarises their existing commitments.[90] Nevertheless, it is novel to see them combined in one and the same article.

The articles that follow were also clearly drafted with energy security considerations in mind: Article 275, for instance, obliges parties to take all measures to prevent unauthorised taking of energy goods, while Article 276 deals with the interruption of transit.[91] The latter article inter alia prohibits, under any circumstance, the interruption of existing transport or transit of energy goods.[92] It seems likely that these articles were taken up owing to the unreliable energy supply and transit situation following the gas disputes between Russia and Ukraine in the 2000s.

With regard to transport of energy, Article 273 focuses mainly on third-party access to the grid. Parties must ensure that tariffs, capacity allocation procedures and all other conditions are objective, reasonable and transparent and do not discriminate on the basis of origin, ownership or destination of the electricity or gas.[93] Here, explicit reference is made to the Energy Community Treaty.[94] Other articles of the chapter (namely Articles 277 and 278) emphasise this relationship once again, also with respect to setting up regulatory authorities for electricity and gas, something that falls into the 'unbundling' legislation of the Energy Community.[95]

When compared to the EU-Singapore FTA, Chapter 11 of the EU-Ukraine FTA is clearly more focused on energy security and fossil fuels, rather than renewable energy. The EU aspired to be as

[84] EU-Ukraine DCFTA (n 4) Article 270(1).

[85] ibid, Article 270(2).

[86] As is well known, Ukraine was subject of many gas transit issues in the 2000s, see on this in particular Marhold (n 27).

[87] Article V (Freedom of Transit) of the GATT 1994: General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) and Article 7 (Transit) of the Energy Charter Treaty, 18 April 1998, 2080 UNTS 100.

[88] EU-Ukraine DCFTA (n 4) Article 272 (Transit).

[89] GATT Article V (Freedom of Transit).

[90] ibid.

[91] EU-Ukraine DCFTA (n 4) Article 275 (Unauthorised takings of energy goods) and Article 276 (Interruption).

[92] ibid, Article 276(2).

[93] ibid, Article 273 (Transport).

[94] ibid.

[95] ibid, Article 277 (Regulatory authority for electricity and gas) and Article 278 (Relationship with the Energy Community).

comprehensive as possible with regard to trade-related energy in its relations with Ukraine. In this respect it managed to address and clarify several outstanding issues, albeit not necessarily with sustainable development in mind. The chapter does, after all, promote the lowering of trade barriers for fossil fuels with the goal of providing the Union with cheap and accessible natural gas. It is questionable to what extent this goal is reconcilable with the Union's 2020 and 2030 energy and climate strategies, as well as with the content of the TSD chapters in its FTAs. However, one should bear in mind that both the Singapore and Ukraine FTAs were negotiated prior to the conclusion of the Paris Agreement (albeit after the UN SDGs). For that reason, it may not be surprising that they do not incorporate the level of commitment undertaken in the framework of the Paris Agreement.

3.2.2. EU-US TTIP negotiations

Similar questions can be raised with respect to the – now dormant – negotiations for the TTIP.[96] These have been anything but controversy free, not least because of the proposed Investor-State Dispute Settlement (ISDS) mechanism.[97] However, from the viewpoint of the EU's energy security ambitions, TTIP is a fascinating example. The reason for this is that in TTIP negotiations, the EU is explicitly seeking access to US energy supplies (mostly shale gas) and aims to include solidified legal commitments on these issues in the Agreement. In recent years, the Union has felt increasingly pressured to diversify its energy supplies, moving away from capricious suppliers in the European neighbourhood and its reliance on countries in the Gulf. It is for that reason that the EU was advocating for the inclusion of an energy chapter during TTIP negotiations. More specifically, the EU was making the case for an 'access to supplies' approach in the chapter (emphasising the export side of trade), rather than the 'access to markets' rationale of WTO rules, a rather novel development.[98]

The US has so far not been willing to accommodate the EU's wishes in this respect and does not seem to be eager to include an energy chapter in the Agreement.[99] One explanation for this is that the position of the US as an energy importing/exporting country has changed significantly over the years: the US was a net importer until relatively recently and even had an oil export ban in place following the 1970s' oil crises to guarantee its energy security.[100] However, large discoveries of shale gas in the early 2010s turned the situation around completely. This resulted in a substantial decrease of US imports of its total crude oil requirement.[101] Moreover, the US has now become the biggest producer of liquid fuels globally and the largest gross exporter of refined products.[102] The EU does not import US crude oil or natural gas at present but hopes to start importing LNG from the US in the near future.[103] The strategy pursued in TTIP fits squarely into the EU's Energy Union ambitions, more specifically in the dimension of energy security discussed above: the EU aims to diversify its energy supplies and move away from capricious suppliers in the European neighbourhood and the reliance on countries in the Gulf.

Apart from increasing its energy security, the EU's ambitions also seem to be to set a new global energy regulation standard for energy governance, using TTIP as a pioneer example. Illustrative thereof is a leaked EU Commission non-paper from May 2014, stating among other things that

[96] TTIP (n 5).

[97] See on this issue e.g. M Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 Journal of International Economic Law 1.

[98] WTO disciplines were mainly designed with an emphasis on imports and providing market access, rather than facilitating access to countries' supplies of natural resources, see generally A Marhold, 'WTO Law and Economics and Restrictive Practices in Energy Trade: The Case of the OPEC Cartel' (2016) 9 Journal of World Energy Law and Business 475.

[99] KJ Benes, *Considerations for the Treatment of Energy in the US-EU Transatlantic Trade and Investment Partnership* (Columbia | SIPA Center on Global Energy Policy, New York, September 2015) 15.

[100] See Borderlex, Interview: End of US Crude Oil Export Ban – Consequences for TTIP and the Climate, 15 January 2016; and J Bordoff and T Houser, *Navigating the US Oil Export Debate* (Columbia | SIPA Center on Global Energy Policy, New York, January 2015).

[101] From 67 per cent in 2008, to 27 per cent in 2014, Benes (n 99) 7.

[102] ibid.

[103] ibid, 8; also see generally on this topic I Espa and K Holzer, 'Negotiating an Energy Deal under TTIP: Drivers and Impediments to U.S. Shale Gas Exports to Europe' (2015) 43 Denver Journal of International Law and Policy 357.

> [t]he EU and the US have been at the forefront of challenging export restrictions for the last decade, as illustrated by their successful common effort to lift China's export restrictions on raw materials including rare earths.
>
> Combatting resource nationalism, together vis-à-vis third countries while at the same time allowing for export restrictions to exist between us sends the wrong message to our partners and offers some of these resource-rich countries a great opportunity to interpret trade rules in a way which is detrimental to our economies.[104]

It transpires from this that the EU is a strong proponent of stronger rules regarding energy access, distribution, trade and sale. The EU's position sends a strong message about what it is aspiring to with respect to TTIP, energy regulation and access to fossil fuels. The 2016 leaked draft chapter, for example, entitled 'EU's proposal for a Chapter on Energy and Raw materials in TTIP', followed up on this, with the EU advocating inclusion of the following:

> In addition to the provisions on Energy and Raw Materials laid down in this document, the Parties must agree on a legally binding commitment to eliminate all existing restrictions on the export of natural gas in trade between them as of the date of entry into force of the Agreement. The language of such commitment is still to be discussed.[105]

While the terms 'energy security' or 'security of supply' are not mentioned directly in the leaked draft, the proposed language strongly implies that strengthening the Union's energy security is the underlying motive. This comes to fruition in the EU's proposal to include an 'Energy Consultation Mechanism', which is to apply in situations of 'emergency or threats thereof in the area of energy'.[106] By means of the draft chapter, including its suggested Energy Consultations Mechanism, the EU is sending a strong message on how it expects to strengthen its energy security. First, it wants to guarantee access to US shale gas supplies, and, second, it wants to set up a mechanism whereby the contracting parties can help each other in energy emergency situations. In this draft chapter, the EU exposes itself as a strong proponent of more solid rules regarding energy access, distribution, trade and sale, with a strong focus on energy security and fossil fuels.

4. Sustainable development and energy security in EU FTAs: A cognitive dissonance

The examples above allow us to draw a comparison between chapters in EU FTAs that focus on sustainable development and clean means of energy generation and those whose primary aim it is to guarantee access to fossil fuels with a view to the Union's energy security. It becomes clear that the EU's internal cognitive dissonance in these areas is externalised in its trade relations with third counties: on the one side, the EU now by default incorporates TSD chapters in its FTAs and the EU-Singapore FTA even contains a progressive chapter on the removal of trade barriers concerning renewable energy. Chapters focusing primarily on energy security with strategic energy partners, on the other hand, are Chapter 11 on 'Trade-Related Energy' in the EU-Ukraine DCFTA, as well as the draft chapters on energy and raw materials negotiated in the context of TTIP. Based on the two types of chapters on energy we have observed in these 'new-generation' FTAs, we can conclude the following: while the chapters on TSD and the promotion of trade and investment in renewable energy (Singapore) are clearly in line with the EU's international climate commitments and notions of sustainable development, this cannot straightforwardly be claimed of the chapters on trade-related energy (Ukraine, TTIP), whose emphasis is on energy security, with sustainable development taking a back seat. These chapters are clearly tailored towards access to fossil fuels and eliminating discriminatory practices in their trade.

[104] European Commission, EU-US Transatlantic Trade and Investment Partnership, 'Raw Materials and Energy – Initial EU Position Paper' (2015) and Non-paper on a Chapter on Energy and Raw Materials in TTIP (leaked) 27 May 2014.

[105] European Commission, DG Trade, Note for the Attention of the Trade Policy Committee, 'TTIP: EU's Proposal for a Chapter on Energy and Raw Materials in TTIP' (Brussels, 20 June 2016).

[106] EU's Proposal for a Chapter on Energy and Raw Materials (n 105) Annex II, Energy Consultation Mechanism, under 1.

In comparing both types of chapters, the reader is therefore confronted with a rather stark contrast. The EU's negotiating agenda with regard to the desired energy and raw materials chapter in the framework of TTIP seems, for instance, to be 'fuelled by a true thirst for fossil fuels'. This presents the EU in a radically different light from that of the global frontrunner in sustainable development it aspires to be.

One way to overcome this cognitive dissonance is for the EU to stress the promotion of renewable energy and sustainable targets in both its internal and external dealings as this will automatically contribute to the Union's ability to become increasingly energy efficient and, more importantly, self-sufficient and less dependent on fossil fuel imports from abroad. A crucial element that would contribute to becoming less dependent on fossil fuels would be for the EU to take a stronger stance against fossil fuel subsidies. EU Member States still subsidise their fossil fuel sector heavily, both directly and indirectly.[107] Such subsidies keep the fossil fuel industry afloat artificially, including from outside the EU, and displace cleaner energies in the energy mix.

It may be argued, however, in the EU's defence, that although different in their objectives, the Singapore and Ukraine FTAs, reflecting both ends of the spectrum, offer interesting examples of modern-day FTAs that include progressive energy regulation. While non-tariff barriers for renewable energy were at the heart of negotiations with Singapore, with Ukraine the objective clearly seems to have been to enhance energy security for the EU, resulting in detailed rules regulating non-discrimination and dual-pricing policies. The result is that the EU-Singapore FTA incorporates a ground-breaking chapter on non-tariff barriers in renewable energy generation. The Ukraine DCFTA chapter on energy focuses rather on transit and pricing policies in a specialised and technical manner.

The question then is to what extent the notions of energy security and sustainable development are contradictory. In the opinion of the author, in theory they are not: long-term energy security implies that this energy security is sustainable in nature as well, as this is the only way forward if we take our climate commitments seriously. However, the reality is that in the short term, there seems to be a tension between the strategic and commercial interests of the Union and its Member States on the one hand, and the non-trade value of sustainable development on the other. This tension is reflected to some degree internally (the Energy Union versus the 2020/2030 strategies) and comes to expression externally in the conclusion of TSD chapters, as well as energy and raw materials chapters, externally in its FTAs.

Apart from balancing sustainable development with energy security, the EU must, moreover, move carefully in these areas as energy and environmental policy remain competences that the EU shares with its Member States (a significant part of which are fully dependent on fossil fuel imports). For matters of coherence and attaining a truly decarbonised economy, both the EU and its Member States must therefore critically assess their stance towards fossil fuels, and to what extent they really need to be dependent on them, or whether cleaner alternatives may be easier to attain than they may seem.

5. Conclusion

The cognitive dissonance in the EU's external energy and sustainable relations described in this paper reflects the tightrope the Union must walk internally: it has set ambitious 2020 and 2030 climate targets, in addition to its international commitments under the Paris Agreement and the UN SDGs. At the same time, however, it continues to be heavily dependent on fossil fuels and realises it is unable to kick this 'addiction' anytime soon, aspiring to establish an Energy Union to integrate the IEM, a large part of which is still fossil fuel based. While it is understandable that the Union needs to guarantee the flow of available and affordable energy for its citizens and that therefore negotiating access to fossil fuels with non-EU countries is unavoidable in the short term, long term this approach will conflict with ensuring a sustainable, decarbonised, fossil fuel-free future for the Union. One may ask how the EU plans to reconcile and bridge these objectives internally, as well as abroad, for example in its Energy Union strategy, in the future.

[107] See generally European Parliament, DG for Internal Policies, *Fossil Fuel Subsidies – In-depth Analysis for the ENVI Committee* (Brussels, 2017).

Acknowledgements

The author wishes to thank the participants of the RENFORCE Workshop on 'Resolving the Tensions between EU Trade and Non-Trade Objectives: Actors, Norms and Processes', held at Utrecht University on 10 November 2017 for their useful feedback on earlier versions of this paper. Special thanks go to Dr Machiko Kanetake and the anonymous reviewers at *Europe and the World: A law review.*

Declarations and conflict of interests

The author declares no conflicts of interest with this work.

Council of the European Union

Brussels, 9 March 2023
(OR. en)

7248/23

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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	6233/23
Subject:	Council conclusions on Climate and Energy Diplomacy

Delegations will find in the annex the Council conclusions on Climate and Energy Diplomacy as approved by the Council at its meeting held on 09 March 2023.

ANNEX

Council conclusions on Climate and Energy Diplomacy

"Bolstering EU climate and energy diplomacy in a critical decade"

1. The consequences of the triple planetary crisis of climate change, biodiversity loss and pollution pose a global and existential threat, particularly affecting the most vulnerable, increasing poverty and inequality and affecting stability. As such, EU Climate and Energy Diplomacy is a core component of EU's foreign policy. The EU is determined, to engage and work with partners worldwide through our Climate and Energy Diplomacy: to implement the Paris Agreement; to limit the global temperature increase to 1.5°C compared to pre-industrial levels; to support the most vulnerable, in particular in least developed countries (LDCs) and Small Island Developing States (SIDSs), in adapting to climate change effects; and to increase collective climate finance. The EU will also continue to support just transitions towards climate neutral and resilient economies and societies, in line with the 2030 Sustainable Development Agenda, and the Addis Ababa Action Agenda on development finance. In this context, the EU underlines the importance of a strong rules-based multilateral approach, with the UN at its core, to successfully address these global challenges.

2. Russia's illegal, unprovoked and unjustified war of aggression against Ukraine, which constitutes a manifest violation of the UN Charter, has created untold human suffering, massive environmental damage and increased risks to nuclear safety in Ukraine. It has precipitated an energy security and food crisis with global impacts. The Council rejects using energy and food as a weapon. The EU will phase out its dependency on Russian gas, oil and coal imports as soon as possible. The EU is fully committed to continuing supporting partners and in particular Ukraine, including in responding to Russia's systematic destruction of Ukraine's critical infrastructure, and in particular the energy system. The EU will contribute to its recovery and resilience needs and will assist its long-term economic and energy transition. Greening Ukraine's reconstruction can serve as one of the win-win foundations of Ukraine's closer integration with the EU.

3. In light of the findings of the Intergovernmental Panel on Climate Change (IPCC), the Council strongly underlines that the climate crisis requires immediate, urgent, accelerated action and strengthened ambition. Strong and ambitious mitigation action is the best tool to prevent increased adaptation needs, as well as loss and damage associated with the adverse effects of climate change. Solutions are available in all sectors that could, together, halve global greenhouse gas emissions by 2030, as indicated by the IPCC. The Council encourages partners to embrace the opportunities to create sustainable economic growth and jobs.

4. The world's collective net-zero ambitions have the potential to reduce temperature rise significantly, but actual policies and investments remain vastly insufficient to stay safely within the Paris temperature goal. Limiting the temperature increase to 1.5°C would substantially reduce the impacts of climate change. In this context, the Council urgently calls for increased global action and ambition in this critical decade, in line with the IPCC analyses: limiting warming to around 1.5°C requires global greenhouse gas emissions to peak by 2025 at the latest, and be reduced with 43 percent by 2030 compared to 2019. In the case of methane, collective efforts need to be made to reduce global methane emissions at least 30% from 2020 levels by 2030.

5. The Council calls on all countries, and in particular on all major emitters and G20 members, to redouble their efforts to adopt and implement ambitious, 1.5°C-compatible climate and energy policies. In this context, the Council calls on all countries, in particular the ones that have not yet done so to present as soon as possible in 2023, well before COP28, their new or updated Nationally Determined Contributions (NDCs) with stronger, more ambitious, and absolute economy wide emission reduction targets. These should be underpinned by concrete policies and measures to implement them. The EU is committed to the swift operationalisation of an ambitious Mitigation Work Programme, as an important instrument to urgently scale up mitigation ambition and implementation in this critical decade to promote robust policies and explore how the different sectors and a just energy transition can contribute towards ambitious climate action and enhancement of commitments. The Council also calls on countries to present, as soon as possible, Adaptation Communications and to present or update their long-term low greenhouse gas emission development Strategies (LT-LEDS) towards reaching net-zero emissions by 2050. The EU encourages more ambitious emission reductions in all sectors, and welcomes commitments from sectors such as transport, including shipping and aviation.

6. This year, the world has a unique opportunity to showcase progress and to provide further guidance for the next generation of NDCs and get on track to reach the Paris Agreement goals via, in particular, the Climate Ambition Summit, alongside the second SDG Summit convened by the UN Secretary General in September, and the political phase of the 'Global Stocktake' at the UNFCCC COP28 in the United Arab Emirates. In this context, the EU welcomes the UN Secretary General's report Our Common Agenda and the announced Summit of the Future, scheduled for 2024, as incentives to spur further global action through an inclusive and effective multilateral approach.

7. The EU itself is taking determined and decisive action to reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels, to reach climate neutrality by 2050 at the latest, and to aim for negative emissions thereafter. The Council stands ready, as expressed in the Council Conclusions of 24 October 2022, as soon as possible after the conclusion of the negotiations on the essential elements of the 'FitFor55' package, to update, as appropriate, the NDC of the EU and its Member States, in line with § 29 of the Glasgow Climate Pact and §23 of the Sharm el-Sheikh Implementation Plan to reflect how the final outcome of the essential elements of the Fitfor55 package implements on the EU headline target as endorsed by the European Council in December 2020. The EU shall set its climate target in accordance with the European Climate Law. To that end, at the latest within 6 months of the first Global Stocktake, the Commission shall make a legislative proposal, as appropriate, based on a detailed impact assessment. The Council invites the High Representative and the Commission, together with EU Member States through our Climate Diplomacy to call upon all other countries to also set high ambitions as soon as possible for the next round of NDCs post-2030, well in advance of COP30 in 2025. With the EU Emissions Trading System as a crucial element of the EU's policy response, the EU encourages partners to establish and extend their own carbon pricing instruments to reduce emissions effectively and efficiently.

8. The Council strongly underlines the crucial importance of strengthening adaptation and resilience measures worldwide and the urgent need to scale up action and support in averting, minimising and addressing loss and damage associated with climate change impacts. The Council also stresses the importance of national and local adaptation planning, to support effective and locally-led implementation, and the importance of achieving the Global Goal on Adaptation. In this context, the Council supports the full and effective operationalisation of the Santiago Network, the implementation of the Sendai Framework for Disaster Risk Reduction, as well as its mid-term review, to be conducted in 2023, and the effective implementation of national adaptation plans.

9. The Council confirms the EU's commitment to support the most vulnerable, especially in least developed countries and small island developing states, and to reinforce the existing network of institutions currently providing assistance and capacity building to developing countries in preparing for and responding to climate impacts. In this spirit, the EU and its Member States underline the call of COP 26 in Glasgow, to at least double collective provision of climate finance for adaptation for developing countries by 2025, compared to 2019 levels.

10. The Council calls on the EU and its Member States to continue to increase funding for adaptation and climate resilience, with a focus on the most vulnerable through joint Team Europe Initiatives as well as through other international instruments such as the Global Shield Against Climate Risks of the V20/G7. The EU strongly supports the United Nations Secretary-General's call for a universal coverage of life saving early warning systems within the next five years including through increased support for the Climate Risk and Early Warning Systems Initiative (CREWS) and through the Systematic Observations Financing Facility (SOFF).

11. The Council calls on the EU and its Member States to continue to constructively engage in the discussions on new funding arrangements, including a fund, to assist developing countries that are particularly vulnerable, in responding to loss and damage associated with the adverse effects of climate change. The Council calls on all partners, from all regions, in a position to do so and beyond the traditional base of providers of development finance, to expand their support as well as to identify new sources of funding, including innovative sources, by enhancing complementarity, synergies, coherence and coordination, and seeking to fill priority gaps in the existing mosaic of solutions and institutions.

12. Given the intrinsic interdependencies between climate change, biodiversity loss and land degradation including desertification, and alterations of the water cycle, the Council calls on the EU and its Member States to continue to increase measures, including funding for biodiversity and nature based solutions and partnerships. The Council recognises the critical role of oceans, their 'blue carbon' function, and the critical need to protect, conserve and restore terrestrial ecosystems, including forests, as well as inland and coastal water ecosystems, in mitigating, adapting to and building resilience against the effects of climate change. The Council also recognises the need for a comprehensive approach on water-related challenges, and welcomes the UN 2023 Water Conference. The Council acknowledges the need for enhanced action on water and is committed to drive the forthcoming Water Action Agenda forward, as part of its Climate and Energy Diplomacy. Furthermore, the Council underlines the importance of ending plastic pollution. The Council also stresses the importance of protecting cultural heritage against the devastating effects of climate change and extreme weather events.

13. The Council welcomes the Kunming-Montreal Global Biodiversity Framework, the landmark agreement adopted at the United Nations Conference on Biodiversity (15th Conference of the Parties to the Convention on Biological Diversity (CBD COP15), which is a framework for global action on biodiversity through to 2030 and beyond, and calls for its effective implementation, including through early submission of high quality national biodiversity strategies and action plans (NBSAP), in time for consideration at CBD COP16. Together with the Paris Agreement, the Framework paves the way towards a climate-neutral, nature-positive and resilient world by 2050.

14. The Council welcomes the commitment to double EU external funding to €7 billion for the period 2021-2027 for biodiversity, in particular for the most vulnerable countries, as well as similar commitments taken by some EU Member States before and at CBD COP15, while recognising that significant additional funding and investments from all countries and sources are needed, as well as avoiding investments that might have negative impacts on biodiversity and nature.

15. The EU – including its Member States and the European Investment Bank (EIB) - is the biggest contributor of public climate finance worldwide, and remains fully committed to contribute to reaching the collective USD 100 billion goal as soon as possible and through to 2025, to support climate action in developing countries and the EU calls on other donors to step up their efforts in this regard. The EU Global Gateway strategy and our Team Europe approach are key instruments in ensuring sustainable investments in the EU's partner countries.

16. The Council stresses the urgency of making finance flows consistent with the goals of the Paris Agreement, mobilising substantially more climate finance globally, scaling up sustainable finance in low and middle income countries, and channelling adequate support in particular to the poorest and most vulnerable in LDCs and SIDSs. In this context, the Council emphasises the importance of accelerating the mobilisation of private finance for climate mitigation and adaptation projects, climate-resilient infrastructure and other development activities and global public goods. The Council underlines the need to involve Finance Ministries in this work, including through the Coalition of Finance Ministers for Climate Action, in order to accelerate the green transitions and achieve a wide scale mobilisation of financial resources in line with the Paris goals. The Council will strive to ensure a dedicated space to discuss the alignment of financial flows, consistent with climate neutrality and climate-resilient development pathways, including at COP28 in Dubai. The Council welcomes the ongoing work of the High Level Expert Group on scaling up sustainable finance in low and middle-income countries for the implementation of the external dimension of the European Green Deal and the development of the Roadmap for Circular Finance.

17. Improving access to finance for climate actions and bringing down financing costs for climate mitigation and adaptation projects in countries that are most vulnerable to climate change, taking into account their debt burden, is key for the collective goal of scaling up climate finance and reaching the Sustainable Development Goals. The Council therefore welcomes the call made at COP27 in Sharm El-Sheikh to all the stakeholders of Multilateral Development Banks (MDBs) and International Finance Institutions (IFIs) to reform MDBs' practices and priorities and to make all financial flows consistent with climate neutrality- and climate resilient development pathways and calls for a clear timeframe. The Council also encourages MDBs to strengthen the technical expertise they offer to developing countries to elaborate, amongst others, energy transition projects that will attract domestic and foreign private investors.

18. The Council welcomes the recommendations from the G20 Expert Panel Independent Review of MDB Capital Adequacy Frameworks and supports their swift implementation. The Council calls on MDBs to implement applicable recommendations, following a careful analysis of their implications, without jeopardising the MDBs' preferred creditor status, high credit ratings and long-term financial stability. Representatives of the EU and its Member States, as members of Boards of MDBs and IFIs, will coordinate to encourage and support ambitious proposals to further align MDBs' and IFIs' strategies with the Paris Agreement goals and to significantly increase climate finance and welcomes the ambition of the European Investment Bank (EIB) in this regard. The Council looks forward to the discussions on such matters, including on the World Bank Evolution Roadmap, at the 2023 IMF and World Bank Spring and Annual Meetings and will engage constructively with a view to ensuring that the debates provide positive input to further discussions including at COP28 in Dubai. The Council also supports the IMF's role to help its members address structural climate related policy challenges and welcomes that climate change considerations have been incorporated into existing IMF lending facilities through the Resilience and Sustainability Trust.

19. The Council looks forward to the "Global Financing Pact" Summit in June 2023 in Paris, which should, amongst others, focus on the mobilisation of more climate finance and unlocking new sources of finance for climate vulnerable countries, by improving investment conditions.

20. The EU and its Member States will continue to increase cooperation and work closely with ambitious partners and organisations on the global just transition towards climate neutrality. The Council welcomes the Just Energy Transition Partnerships (JETP) in G7 context with South Africa, Indonesia and Vietnam, and is committed to their operationalization. The Council also supports the ongoing work on other JETPs. The Council looks forward to a strong engagement from all partner countries concerned, necessary for a country-led transformation. In addition to JETPs, the Council invites the High Representative and the Commission to build on ongoing initiatives and to explore the opportunities for increased cooperation with countries that rely heavily on fossil fuels, especially coal, in particular in the Western Balkans, the Eastern Neighbourhood and the Southern Neighbourhood and with developing and middle-income countries with high energy related emissions.

21. The Council recognizes that climate change, biodiversity loss, desertification, pollution and environmental degradation represent increasing risks to human, state and regional security and may aggravate conflict drivers and dynamics, as well as dimensions of fragility. The Council reaffirms its diplomatic engagement on water as a tool for peace, security and stability. The Council also recognises the significant gap in climate finance available to fragile and conflict-affected States. It welcomes the 2020-2022 Joint Progress Report on the Climate Change and Defence Roadmap and the Concept for an Integrated Approach to Climate and Security and recalls the Council conclusions of November 2022 on Women, Peace and Security. The Council underlines the importance of integrating the climate, peace and security nexus in EU's external policy and actions, including in analyses, inclusive climate and disaster risk reduction processes and anticipatory action, the conduct of peacebuilding, mediation, conflict prevention, development cooperation, climate finance and climate diplomacy including dedicated water diplomacy. The Council invites the High Representative to strengthen the EU's analytical, early-warning and strategic foresight capacities, mainstream the climate, peace and security nexus, and issue timely warning and analysis on climate related risks.

22. The Council welcomes the High Representative's and Commission's intention to present a joint proposal in order to enable the EU to better prevent and manage the comprehensive security and defence implications of climate change and environmental degradation. The Council also welcomes and encourages increased cooperation with other international and regional organisations such as United Nations, NATO, the OSCE and the African Union as well as with partner countries in line with the EU institutional framework and with full respect to the EU decision-making autonomy.

23. The Council reconfirms that the primary goal of the EU's external energy policy is to support, intensify and accelerate the ongoing global energy transition as a crucial element towards achieving climate neutrality. An accelerated inclusive and just energy transition is also the key solution ensuring energy security and universal access to safe, sustainable and affordable energy in the EU and our partner countries worldwide while reducing greenhouse gas emissions.

24. The Council acknowledges the Joint Communication 'EU external energy engagement in a changing world' as an essential element of the 'REPowerEU' plan proposed by the Commission, responding to the energy crisis brought about largely by Russia's war of aggression against Ukraine, and Russia's weaponisation of energy against the EU and partner countries. The EU and its Member States will continue to limit the impact of Russia's war of aggression on the energy security and affordability of energy in third countries, in particular the most vulnerable.

25. EU energy diplomacy will actively support the implementation of relevant sanctions and the rollout of the price-cap mechanism on Russian oil and petroleum products.

26. The Council invites the High Representative and the Commission to reinforce, in close cooperation with Member States, outreach, coordination and partnerships with third countries in line with the priorities outlined below. New energy partnerships should complement existing energy cooperation with key partners while safeguarding the EU's own resilience and competitiveness and domestic resources.

27. EU energy diplomacy will promote the increasing uptake and system integration of renewable energy conscious of water and environmental stress, and electricity connectivity. It will also promote the deployment of safe and sustainable low-carbon technologies.

28. EU energy diplomacy will promote the development of rules-based, transparent, and undistorted global hydrogen markets based on reliable international standards and certification schemes.

29. Recognising the crucial role of energy efficiency and savings, the Council invites the High Representative and the Commission to accelerate actions towards making them into a global priority, and to explore the launch of a dedicated initiative, building on existing international efforts, in addition to enhanced bilateral cooperation.

30. The Council highlights the need for investment into increasingly circular industrial processes and value chains aiding the transition towards climate neutrality in hard to abate sectors. The Council further highlights the importance of continuous innovation, in particular in technologies crucial for reaching climate neutrality, and supports further strengthening of bilateral strategic research partnerships and cooperation through global fora such as Mission Innovation, and the Clean Energy Ministerial. The EU will cooperate with international partners to reform regulatory frameworks, will seek to strengthen the technological leadership of EU companies, support the uptake of EU standards globally and promote EU businesses' fair and undistorted access to international markets for resources and technologies, in order to maintain competitiveness, and avoid new dependencies.

31. The Council considers that a dependence on fossil fuels leaves countries vulnerable to market volatility and geopolitical risk and that the shift towards a climate neutral economy will require the global phase-out of unabated fossil fuels, as defined by the IPCC, and a peak in their consumption already in the near term, while recognising a transitional role for natural gas. The EU will systematically promote and call for a global move towards energy systems free of unabated fossil fuels well ahead of 2050. In this regard, the Council recalls the commitment taken at COP 26 to close the book on unabated coal power through a phase down, and, calls for a resolute and just world-wide transformation towards climate neutrality, including a phasing out of unabated coal in energy production and – as a first step – an immediate end to all financing of new coal infrastructure in third countries.

32. While recognising the need to provide targeted support to the most vulnerable groups, EU energy diplomacy will promote the global phase-out of environmentally harmful fossil fuel subsidies, which are not contributing to a just transition towards climate neutral energy systems. The Council welcomes the progress made in the World Trade Organisation's initiative on fossil fuel subsidy reforms.

33. The EU's overall fossil fuel imports from Russia have considerably decreased over the past few months. In this context, EU energy diplomacy will support urgent efforts to reinforce and safeguard the EU's energy security while avoiding new dependencies, which is necessary to preserve the competitiveness of the EU and ensure affordable energy to citizens. While in the immediate and medium-term urgent steps are needed to further diversify natural gas supplies, the Council recalls that, in particular in view of collective Member States action on energy savings and accelerated renewables deployment, there is no need for a one-to-one replacement of former Russian natural gas import volumes. In order to support the energy diversification objective under REPowerEU, EU energy diplomacy will support outreach and coordination with reliable natural gas producers and large consumers, promote relevant infrastructure, interconnections and transparent, rules-based, open and liquid energy markets. EU energy diplomacy will support the EU Joint Purchasing Mechanism under the EU Energy Platform, including Energy Community Contracting Parties, paying particular attention to the energy security and resilience of these partners. EU energy diplomacy will also support ongoing efforts by affected Member States to diversify nuclear fuel supplies, as appropriate.

34. The Council emphasises that EU fossil fuel diversification efforts should not undermine long-term climate neutrality goals globally and should avoid creating fossil fuel lock-ins and stranded assets. Diversification efforts should give preference to using existing fossil fuel infrastructure emphasising their potential for re-purposing, and include systematic action to reduce methane emissions. The Council recalls, in particular, the climate and energy security value of trading schemes building on methane capture, such as 'You Collect/We Buy'. EU external energy action shall aim to link fossil fuel diversification efforts with long-term energy transition partnerships.

35. The Council emphasises the need to support international efforts to reduce the environmental and climate impact of existing fossil fuel infrastructure, including black carbon. In this context, the EU, together with the US and other partners, will continue to further promote and develop action under the Global Methane Pledge. The Council welcomes, in this respect, the development of the Methane Alert and Response System by the International Methane Emissions Observatory. The Council calls on the High Representative and the Commission to take forward work on the Joint Declaration from Energy Importers and Exporters on Reducing Greenhouse Gas Emissions from Fossil Fuels.

36. In order to ensure energy security in the decades ahead, the Council emphasises the need to strengthen and diversify global supply chains of sustainable raw materials needed for the energy transition and looks forward to the Commission proposal on a Critical Raw Materials Act, taking full account of its geopolitical dimensions.

37. EU energy diplomacy will continue to promote and support the highest nuclear safety, environmental and transparency standards, regionally, in the immediate vicinity of EU borders, and globally.

38. The Council recalls the urgent need to deliver on energy poverty and universal energy access in line with the Sustainable Development Goal 7 using innovative finance models and technologies with a particular focus on rural electrification, including decentralised energy systems, and the clean cooking challenge. The Council looks forward to the review of SDG7 at the 2023 high Level Political Forum and second SDG Summit.

39. The Council emphasises the need to ensure effective multilateral architecture and governance mechanisms driving an inclusive and just global energy transition in alignment with the Paris Agreement objectives, and recalls earlier statements in support of ongoing reform processes whilst limiting the further fragmentation of initiatives.

40. The Council recognises that the energy transition toward climate neutrality, pursued at the requisite pace, will have a significant impact on societies, economies and geopolitics globally. EU foreign policy will continue to strengthen foresight capability to anticipate new security and geopolitical challenges and work, in this context, with third country partners and relevant international initiatives and organisations, such as IRENA and the OECD, as appropriate.

41. The Council, together with the High Representative and the Commission, will continue to reinforce existing and initiate new ways of cooperation with partner countries, civil society and youth and women's initiatives, aiming to increase climate action on regional, national and subnational level, emphasizing the principle of solidarity and the UN's 'leave no one behind' approach. In this regard, the Council recalls its Conclusions from October 2022 on the importance to respect and promote human rights, the right to health, the right to a clean, healthy and sustainable environment, the rights of indigenous peoples as set out in the UN Declaration on the Rights of Indigenous Peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, as well as gender equality and the full enjoyment of all human rights by women and girls and their empowerment when taking action to address climate change.

42. The Council is committed to promoting a human rights-based and gender-responsive approach to climate action, promoting social justice, fairness and inclusiveness in the global transition towards climate neutrality, full, equal and meaningful participation and engagement of women in climate-related decision-making and fully meeting our human rights obligations when taking action to address climate change. The EU will also continue to support meaningful engagement of youth and children in climate change decision-making processes, as well as climate education and public awareness on climate change. The Council welcomes the recognition by the UN Human Rights Council and General Assembly that the right to a clean, healthy and sustainable environment is a human right. The EU will actively engage in discussions advancing this right and promote inclusion and non-discrimination. The Council recognises the contribution of environmental human rights defenders, who are facing unprecedented levels of threats and attacks.

43. The Council invites the High Representative, the Commission and all Member States to strengthen EU Climate and Energy Diplomacy as a political priority, through intensified coordination, information exchange and strengthening of the EU Delegations and Member States' embassies, and relevant EU and international networks and working groups. The Council encourages EU and Member States' climate outreach missions and regional initiatives, including joint ones, especially in the run-up to COP 28 and the Global Stocktake. The Council emphasizes the need for increased coordination to respond to misinformation and disinformation campaigns aiming to discredit EU actions. The Council will regularly follow up on joint work to coordinate and enhance the EU's climate and energy diplomatic impact, and invites the High Representative and the Commission to strengthen their capacity dedicated to EU Climate and Energy Diplomacy.

44. The EU and its Member States thank the Government of Egypt for hosting COP27 in Sharm El-Sheikh and look forward to working with the incoming United Arab Emirates COP28 Presidency and all partners towards a successful and ambitious outcome of COP28.

Council of the
European Union

Brussels, 18 March 2024
(OR. en)

7865/24

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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
Subject:	Council Conclusions on Green Diplomacy

Delegations will find in the annex the Council conclusions on Green Diplomacy as approved by the Council at its meeting held on 18 March 2024.

ANNEX

Council Conclusions on EU Green Diplomacy

EU diplomacy promoting the just and inclusive green transition and supporting the implementation of global commitments

1. The Council reiterates the gravity of the accelerating, deepening and mutually reinforcing triple planetary crisis of climate change, biodiversity loss and pollution, posing a global and existential threat and aggravating existing security concerns. The Council firmly believes that this crisis must be addressed in a comprehensive and integrated way through enhanced multilateralism and global action and as a core component of EU foreign and security policy.

2. The Council reaffirms the EU's strong commitment to work closely with partners to accelerate the global just and inclusive green transition. The Council emphasises the key role of EU green diplomacy in anchoring and consolidating global commitments and promoting their implementation, including those captured in the outcome of the first Global Stocktake (GST) under the Paris Agreement, agreed in Dubai at the 28th UN Climate Conference, and in the Global Biodiversity Framework. In this context, the EU and its Member States will continue to strengthen collaboration with partners in developing and implementing ambitious Nationally Determined Contributions (NDCs) that effectively address the commitments taken in the GST, including 'transitioning away from fossil fuels'. In addition, the EU and its Member States will work with partners to develop and submit National Biodiversity Strategies and Action Plans (NBSAPs), as well as relevant targets, updated and developed ahead of the 16th UN Biodiversity Conference. The Council urges G20 members to take leadership in this regard, as they represent around 80% of global emissions and have a key role in tackling the world's environmental and climate challenges.The Council strongly underlines the need for immediate, urgent, accelerated action, as underlined by the reports of the IPCC, IPBES and IRP [1] and reaffirms the importance of a science-driven global transition to climate neutrality that is just, inclusive, sustainable, in harmony with nature, and in line with the commitments, policies, principles and values of the EU. The Council calls for enhanced cooperation with partners at all levels, and jointly with businesses and industries, to fully benefit from the opportunities the green transition offers to all including strengthened

[1] Intergovernmental Panel on Climate Change, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and the International Resource Panel

competitiveness, job creation and growth and draws attention to the enabling role of free, open and fair trade.

3. The Council expresses severe concern over the harm to the climate and environment, in addition to the immense human suffering, caused by ongoing armed conflicts worldwide and the risk they pose for effective global action to address the triple planetary crisis.

4. The Council condemns Russia's illegal, unprovoked and unjustified war of aggression against Ukraine, and reaffirms its unwavering support to Ukraine and its people. It has inflicted massive environmental damage, nuclear safety risks, and precipitated energy and food insecurity globally. The Council underlines the need to assess the damage and is committed to address it in the context of Ukraine's recovery and reconstruction. The Council also calls on the international community to hold Russia accountable.

5. The Council calls on all partners to address disinformation and misinformation aimed at creating and disseminating of false or manipulated information related to climate change, biodiversity loss, environmental degradation, pollution and their consequences and points out the importance of science and education.

6. Human rights, democracy and the rule of law remain the EU's common compass and core values including in our green diplomacy. Access to a clean, healthy and sustainable environment is a human right. Specific emphasis should be given to the rights of children and youth, as they play an inextricable role in future challenges and solutions as agents of change. The EU will also continue to uphold, promote and protect gender equality, the full enjoyment of all human rights by all women and girls, and their empowerment. The Council underlines the importance of enhancing the voice and full, equal and meaningful participation and leadership of women and young generations in decision making at all levels aimed to improve climate, energy, environment and water policies. The Council also stresses the importance of cooperation with and protection of civil society, environmental human rights defenders, Indigenous Peoples, local communities, persons with disabilities, and their empowerment.

7. The Council calls for a coordinated approach to tackle climate change, land degradation, desertification and biodiversity loss and underlines the critical role of oceans and ecosystems and the importance of Nature Based Solutions. In this context, the Council calls for enhanced collaboration between Convention secretariats of the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the UN Convention to Combat Desertification (UNCCD) and invites Parties to enhance cooperation between the national focal points, as appropriate to promote stronger synergies at international and national levels.

8. The Council looks forward to the adoption of an action-oriented Pact at the UN Summit of the Future in September 2024. The Pact should reaffirm the commitment to reform the multilateral system and enable the UN to address present and future global challenges, and deliver on its main commitments, including the 2030 Agenda and Sustainable Development Goals (SDGs), the Paris Agreement, the Addis Ababa Action Agenda (AAAA), and the Kunming-Montreal Global Biodiversity Framework (GBF). The Pact should also address interlinkages between climate change, biodiversity loss, environmental degradation, development needs, human rights and peace and security.

9. The Council invites partners to work closely with the EU to accelerate and benefit from the green transition and supports the implementation of global commitments through frameworks such as Green Alliances, Green Partnerships, Green Agendas, high-level dialogues, trade agreements and other important formats for cooperation, such as the Samoa Agreement. The Council reiterates the importance of the Just Energy Transition Partnerships and remains committed to their further operationalization with the support of the relevant partners. The EU will continue to work closely with partners in the Eastern and Southern Neighbourhood, the Western Balkans, Africa and worldwide, in particular with the most vulnerable, including least developed countries (LDCs) and Small Island Developing States (SIDS) and partner countries that have put forward ambitious plans, through the NDICI Global Europe and Team Europe initiatives and under the Global Gateway Strategy, amongst others. The Council underlines the importance of the role of and collaboration with the private sector and businesses in these efforts.

10. In line with their respective EU paths, the Council invites the Commission to strengthen support to and cooperation with the candidates for EU accession to accelerate their alignment with and implementation of the EU acquis on energy, environment, and climate, including in the context of the Energy Community, and to facilitate their just and inclusive green transition.

11. The Council thanks the United Arab Emirates (UAE) for hosting the UN Climate Change Conference (COP28) in Dubai and welcomes the adoption of the UAE consensus. The EU looks forward to working with all partners, including with the troika of the current Presidency, the United Arab Emirates, and incoming COP Presidencies of Azerbaijan and Brazil towards successful and ambitious outcomes of COP29 and COP30.

12. The Council expresses great concern that, despite overall progress made at multilateral level and concrete steps and actions taken at national level, Parties of the Paris Agreement are collectively still not on track towards achieving its purpose and its long-term goals, as acknowledged in the first Global Stocktake (GST).

13. In this context, the Council calls on all partners to follow up on the implementation of the outcome of the first Global Stocktake (GST) as important guidance for enhanced action in this critical decade, as well as for the preparation of the Nationally Determined Contributions (NDCs) to be submitted nine to twelve months ahead of COP30 in November 2025[2], reflecting the highest possible ambition as well as seeking synergies with the 2030 Agenda for Sustainable Development. Increased ambition in this critical decade and beyond requires reaching global emission reductions of greenhouse gas emissions of 43% by 2030 and 60% by 2035, compared to 2019 levels. The Council encourages G20 members to take the lead in implementing the outcome of the first GST, including the transition away from fossil fuels, and invites all partners to work with the EU and its Member States on more ambitious NDCs. The EU is committed to also work with partner countries, development partners, international organisations and organisations such as the NDC Partnership, to develop and implement ambitious NDCs with a 2035 target. The EU recalls the COP28 call to all parties to include, in their NDCs, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and be aligned with the goal of limiting global warming to 1.5˚C. The Council calls also on partner countries to present or update their long-term low greenhouse gas emission development strategies towards reaching net-zero emissions by 2050.

14. The Council reaffirms that the EU is committed to climate neutrality by 2050 at the latest and aims to achieve negative emissions thereafter, and that it has set an intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. The EU is taking determined and decisive action to deliver on these legally binding targets enshrined in European Climate Law, and offers to share experience, lessons-learnt, best practices, and the innovative solutions developed by EU policy, research, industry and business with partners globally, supporting the development and implementation of more ambitious NDCs.

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2 *Decision of the 5th CMA, Outcome of the 1st GST, paragraph 166, advance unedited version* CMA4_AUV_TEMPLATE (unfccc.int).

15. The Council takes note of the publication of the Commission's Communication on Europe's 2040 climate target and path to climate neutrality by 2050 at the latest and its recommendations. It informs the discussion of the EU NDC to be submitted well ahead of COP30. This sends a powerful signal to markets and investors, and to other international partners to increase their own ambition, and to set the world on a trajectory that is compatible with the 1.5˚C temperature goal.

16. The Council invites partners to work with the EU on developing a global approach on carbon pricing, as the most efficient and cost-effective way to reduce emissions and stimulate green investments, and encourages and supports other jurisdictions to introduce or improve their own carbon pricing mechanism, amongst others by aligning carbon markets with the Call to Action for Paris Aligned Carbon Markets. In line with the Carbon Border Adjustment Mechanism, aiming at reducing the risk of carbon leakage in a WTO compatible way, the Council calls for enhanced international cooperation and outreach to partners to lower carbon emissions in production processes.

17. The Council also urgently calls upon the Commission and Member States to work with partners and within International Civil Aviation Organisation (ICAO) and International Maritime Organisation (IMO) to agree on ambitious measures addressing the emissions of international transport including shipping and aviation, and to work on achieving climate neutrality in the buildings sector by 2050. The Council also calls on the EU and its Member States to promote ambitious global phase-down of hydrofluorocarbons (HFCs) under the Kigali Amendment of the Montreal Protocol, as well as a substantial reduction of other F-gases such as SF6 within the next ten years.

18. Acknowledging the progress achieved in the implementation of the Global Methane Pledge, the Council recalls the need for concrete measures to tackle rising methane emissions. The EU will continue to call on partners who have not yet done so to join the Pledge and to include concrete methane reduction measures in their NDCs. The Council stresses the importance of targeted actions in all relevant sectors and underlines the short-term opportunities in the energy sector to address methane leaks, venting and flaring and calls for strengthening engagement with partner countries in support of the work of the International Methane Emissions Observatory. In this context, the Council underlines the importance of creating conditions, including through effective trading schemes to reduce methane emissions, such as 'You Collect/We Buy', in cooperation with producing countries.[3]

19. Building on the GST call to transition away from fossil fuels in energy systems in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science, the Council underlines the need for action based on its Conclusions from October 2023. In this context, the EU and its Member States are determined to engage with partner countries to promote an energy sector predominantly free of fossil fuels well ahead of 2050 in line with the mid-century climate neutrality goal, and work towards implementation, through accelerated action in this critical decade, additional sectorial milestones and ambition, aiming to achieve a fully or predominantly decarbonised global power system in the 2030s, calling for leaving no room for new coal power. In this regard, the Council highlights the importance for effective cooperation with partner countries including through multilateral initiatives such as the Powering Past Coal Alliance. The Council recalls the need for phasing out as soon as possible fossil fuel subsidies which do not address energy poverty or just transition.

[3] Council conclusions of October 2023 on Preparations for the 28th Conference of the Parties (COP28) of the United Nations Framework Convention on Climate Change (UNFCCC) (Dubai, 30 November – 12 December 2023).

20. The Council welcomes partners who joined the Global Renewables and Energy Efficiency Pledge, and encourages all partners to integrate the GST global goals of tripling global renewable energy capacity and doubling the global average annual rate of energy efficiency improvements by 2030 into the NDCs and their implementation. The Council calls on EU diplomacy to continue to promote an accelerated uptake and system integration of renewable energy and the energy efficiency first approach, as among the most market ready and available at scale mitigation technologies, the development of conducive policy and the alignment of financial flows, in particular in support of developing countries. In this regard, the Council notes the importance of electricity interconnections with partner countries, including with the Western Balkans, Eastern and Southern Neighbourhood. The Council calls on EU diplomacy to continue to promote the deployment of safe and sustainable low-carbon technologies.

21. The Council acknowledges the need for rules based, transparent, and undistorted global hydrogen markets based on reliable standards and certification schemes, and the deployment of necessary infrastructure, while conscious of water and environmental stress. The Council underlines that emission abatement technologies which do not significantly harm the environment, exist at a limited scale and are to be used to reduce emissions mainly from hard to abate sectors and that removal technologies are to contribute to global negative emission and should not be used to delay climate action in sectors where feasible, effective and cost efficient mitigation alternatives are available particularly in this critical decade.

22. Given that some partner countries opt for nuclear energy, the Council reiterates the necessity to continue to promote and support the highest nuclear safety, environmental and transparency standards, regionally, in the immediate vicinity of EU borders, and globally.

23. The Council calls for strengthened foresight to assess and for proactive policy to rapidly address the changing geopolitical dynamics of the global energy transition, and engagement with partners in light of the anticipated decline of fossil fuel demand in the EU, in the EU's proximity and globally.

24. The Council welcomes the effective diversification efforts, inter alia through the EU Energy Platform and AggregateEU that contributed to phasing out EU energy dependency on Russia. To ensure energy security and affordability throughout the transition to climate neutrality, the Council calls upon the High Representative and the Commission to continue to support these diversification efforts, in line with the Versailles Declaration, in close engagement with partner countries. The Council emphasises the importance of strengthening transparent, rules-based and liquid markets, and interconnections with third countries, while acknowledging the need to avoid creating fossil fuel lock-ins ensuring a 1.5°C aligned energy planning, the potential for re-purposing and future-proofing infrastructure. The Council notes with concern the increasing cyber and physical threats to critical energy infrastructure, and stresses the importance of bolstering resilient energy systems, including through cooperation with global partners. EU Diplomacy will continue to support ongoing efforts by affected Member States and Ukraine to diversify nuclear fuel supplies, as appropriate.

25. The Council is committed to the full and effective implementation of sanctions against Russia, including in the energy sector, and the prevention of their circumvention, and calls on partners to enhance cooperation on the enforcement of the oil price cap policy.

26. The Council is committed to continue supporting Ukraine in cooperation with partners, including with equipment necessary to repair, restore, and defend its energy system, and to build a more resilient, decentralized and sustainable energy sector closely integrated with the EU.

27. In order to ensure energy security and reduce strategic dependencies in the decades ahead, the Council emphasises the need to strengthen and diversify global supply chains of critical raw materials necessary for the energy transition in line with the Critical Raw Materials Act, ensuring high environmental and social standards and taking full account of its geopolitical dimension.

28. The Council recalls the urgent need to deliver on energy poverty and universal access to affordable, reliable, sustainable and modern energy in line with the Sustainable Development Goal 7, including through gender-responsive finance models to combat gendered effects of energy poverty and to enhance women's access to clean energy jobs. The Council calls for a particular focus on deployment of renewable energy access and rural electrification through decentralised energy systems, and the challenge of clean cooking, including in displacement settings. In this regard, the Council calls on partners to increase their efforts and contributions, in support of the most vulnerable that are most in need.

29. Tackling the triple planetary crisis requires mobilisation of more finance, the bulk of which will have to come from private sources. In this context, the Council reiterates the urgency of making finance flows consistent with the pathway towards low greenhouse gas emissions and climate-resilient development in this decade as a critical enabler of the global effort to mobilise finance at scale and to deepen global sustainable finance and capital markets in this respect.

30. The Council reiterates the importance and urgency of accelerating reform of the international financial architecture and takes note of initiatives such as the Summit for a New Global Financing Pact and the Bridgetown Agenda 2.0. The EU and its Member States call on Multilateral Development Banks, their shareholders and the private sector, to scale up the provision and mobilisation of climate finance significantly and expeditiously and increase its reach in particular to the poorest and most vulnerable communities and countries, including fragile and conflict affected areas, that are often faced in parallel with high debts and lacking fiscal space. The Council emphasises that no country should have to choose between fighting poverty and fighting for the planet. The EU encourages financial institutions to increase their support in particular for adaptation and resilience building initiatives, whilst achieving a balance between mitigation and adaptation.

31. The EU and its Member States look forward to engaging with international partners towards the setting of the new collective quantified goal (NCQG) on climate finance at COP29, taking into account the priorities and needs of developing countries, with public finance as an important component, and better targeted, in particular to the most vulnerable countries and communities, while at the same time underlining its key role in leveraging private investments. There is also a need to strengthen the enabling environment for investments, encouraging more climate ambition and catalysing private investment and domestic resource mobilisation in all countries.

32. The Council reaffirms the need for a broader base of contributors as a prerequisite for setting an ambitious NCQG and calls on all countries according to their financial capabilities, including emerging economies, to contribute to the new goal. Recognising that needs are substantial and conventional sources of public finance alone cannot provide the quantum necessary for the new goal, the Council calls for additional, new and innovative sources of finance from a wide variety of sources, including from the fossil fuel sector and other high-emission sectors, to be identified and utilised to provide climate finance, including to support the poorest and most climate vulnerable countries and communities, in mitigating and building resilience against climate change. The Council looks forward to the work of the Taskforce on International Taxation and to its first assessments on options to be presented at COP29.

33. In 2022, the EU and its Member States contributed €28.5 billion to international public climate finance, with more than half addressing climate adaptation or cross cutting action involving both mitigation and adaptation initiatives, and mobilised an additional amount of €12 billion of private finance, contributing significantly to the USD 100 billion goal on climate finance.

34. Given the already severe consequences of climate change, the Council expresses its determination to work with partners to develop National Adaptation Plans in order to enhance their adaptive capacity, strengthen resilience and reduce vulnerability, notably with the most vulnerable countries including LDCs and SIDS using ecosystem-based adaptation approaches, where possible. The Council welcomes the adoption of the UAE Framework for Global Climate Resilience at COP28, and its agreed targets. The Council calls for enhanced coordination and collaboration between existing structures and climate adaptation processes within and outside the UNFCCC, in order to increase support for, and enhance implementation of, adaptation and resilience building initiatives, particularly in fragile and conflict affected areas and recalls the importance of supporting the UN Secretary General's Early Warnings for All initiative. The Council also reaffirms its commitment to the objectives of the Sendai Framework for Disaster Risk Reduction. The Council encourages cooperation on enhancing resilience and managing climate risk exposure.

35. The Council strongly underlines the urgent need to scale up global action and support from all sources in averting, minimising, and addressing loss and damage associated with the adverse effects of climate change and welcomes the COP28 decision operationalising the new funding arrangements including a fund for assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage. The Council welcomes the pledges made for the initial capitalisation of the fund and for the existing funding arrangements, including significant pledges from the EU and EUMS and the UAE, and calls for a swift start of the fund.

36. The EU and its Member States highlight their commitment to be at the forefront of the collective efforts to scale up adaptation finance provision and mobilisation to developing countries with a specific focus on countries and communities that are particularly vulnerable to the adverse effects of climate change such as LDCs, SIDS, and fragile and conflict-affected states. In this vein, the Council calls on all partners, from all regions, according to their financial capabilities and including those beyond the traditional base of providers of development finance, to expand their support to climate adaptation and to the funding arrangements for responding to loss and damage, including to the fund. Given the magnitude of the challenges, the Council also emphasises the need to identify new and innovative sources of funding.

37. The Council also stresses the importance of protecting cultural heritage against the devastating effects of climate change and extreme weather events.

38. Building on the findings of the Global Resource Outlook 2024 by the UNEP International Resource Panel, and as a follow to the GST, the Council stresses the opportunities of the circular economy and sustainable circular bio-economy to achieve sustainable consumption and production, facilitate resource efficiency, reduce generation of waste, greenhouse gas emissions, environmental pollution and negative impacts on biodiversity. In efforts to fast-track the transition, the Council calls for a high-level UN Conference on SDG12 and invites partners to join the Global Alliance on Circular Economy and Resources Efficiency.

39. In the global fight against pollution, the Council calls for joint efforts to conclude, by 2024, the negotiations of an ambitious International Legally Binding Instrument to end plastic pollution, including in the marine environment, based on full lifecycle approach, and sending a clear signal on the reduction of production of primary plastics polymers. The Council further underlines the need for constructive and active engagement with partners in this regard. The Council also supports full and rapid implementation of the Global Framework on Chemicals – For a Planet Free of Harm from Chemicals and Waste and calls for a timely establishment of a Science Policy Panel to contribute further to a sound management of chemicals and waste and to prevent pollution.

40. Reiterating its strong commitment to implementing the landmark Kunming-Montreal Global Biodiversity Framework (GBF), the Council urges Parties to revise their National Biodiversity Strategies and Action Plans and submit national targets aligned with the GBF to the CBD Secretariat well in time for COP 16 in October 2024.

41. The Council underlines that CBD COP16 must strengthen momentum for implementation of the GBF, and complete work on outstanding issues, notably resource mobilisation, the multilateral mechanism for sharing the benefits from the use of digital sequence information (DSI) and on the monitoring, reporting and review mechanisms.

42. The Council reiterates its commitment to step up funding for global biodiversity and the urgency to align relevant fiscal and financial flows with the GBF goals and targets. The Council therefore calls on all relevant actors, including multilateral development banks, their shareholders and the private sector to scale up biodiversity finance by exploring all sources including innovative financing instruments, maximised synergies with climate finance and enhanced international coordination for the alignment of standards for sustainable finance tools, such as taxonomies. The EU committed to double its external funding for biodiversity to €7 billion for the period 2021-2027 and a number of EU Member States took similar commitments. The Council encourages all relevant actors to support and contribute to the Global Biodiversity Framework Fund established under the Global Environment Facility (GEF) and calls on all countries to identify by 2025, and then phase out or reform incentives, including subsidies, harmful for biodiversity, in a proportionate, just, fair, effective and equitable way.

43. The Council highlights the importance of achieving land degradation neutrality by 2030 and welcomes COP16 to the UN Convention to Combat Desertification in Saudi Arabia as the moment for accelerating national and global action on land restoration, soil health, drought resilience and green transition.

44. The Council recognizes that the stability of the global water cycle is a global concern that underpins the achievement of all SDGs. The Council acknowledges the role of aquatic ecosystems, notably wetlands, in climate and biodiversity actions. In this context, and given the global water crisis, the Council reiterates the importance of a strategic EU approach to water resilience and security and underlines the need for enhanced diplomacy in this regard. The Council encourages joint efforts towards an effective multilateral governance including through the appointment of a UN Special Envoy on Water, enhanced integration of water-related priorities in relevant multilateral processes and a regular intergovernmental dialogue on water with further UN Water Conferences to be organised in 2026 and 2028 and the One Water Summit to be held in New York in 2024. The Council welcomes the Water Action Agenda as a key outcome of the 2023 UN Water Conference and the adoption of a resolution on water at the 6th UN Environment Assembly (UNEA) and calls for their swift implementation. The Council supports the upcoming UN Water-led system-wide strategy on water and sanitation to enhance political momentum to deliver on SDG6. The Council also encourages continued globalisation of the UN Water Convention on the Protection and Use of Transboundary Watercourses and International Lakes that can be conducive to global stability, peace and security.

45. The Council welcomes the COP28 emphasis on the need for more investment, action and support to halt and reverse deforestation and forest degradation by 2030, including through strengthened sustainable forest management and sustainable agriculture and food systems. The EU is doing its part and will engage in dialogue and cooperation with partners, including through an EU strategic framework for engagement, through the framework of country packages for forests, nature and climate, and under the dedicated Team Europe Initiative towards a global transition to deforestation-free value chains.

46. Acknowledging that agriculture and food systems contribute to, are affected by, and are part of the solution to climate change and biodiversity loss, the Council underlines the urgent need for a transition towards sustainable and resilient agriculture and food systems and is committed to continued collaboration with partners in this regard.

47. The Council reiterates the important role of ocean-based action including its 'blue carbon' function, and that of the marine and coastal biodiversity, in the climate mitigation and adaptation efforts and food security. The Council hence underlines the need to deliver on SDG14 and develop a sustainable blue economy. The Council therefore calls for stronger international ocean governance and dialogue and welcomes the 2024 Our Ocean Conference in Greece and the 2025 UN Ocean Conference in France with a commitment to participate at the highest possible level.

48. The Council calls on all members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for the adoption of new marine protected areas in the Southern Ocean to establish a representative system of Marine Protected Areas as a concrete deliverable, under the 30x30 target of the Kunming-Montreal GBF and implementation of SDGs.

49. Following the adoption of the Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, which is key for the health of our oceans, the Council notes that the EU and its Member States are committed to its swift ratification and calls on partners to accelerate their ratification process so the agreement can enter into force in time for the 2025 UN Ocean Conference.

50. The Council welcomes the Joint Communication on "A new outlook on the climate and security nexus - Addressing the impact of climate change and environmental degradation on peace, security and defence" and calls for its full, comprehensive and swift implementation.

51. The Council stresses the importance of a shared and enhanced understanding that climate change and environmental degradation lead to increased instability and conflicts, and vice-versa, as well as to human suffering, resource scarcity including water and food insecurity, internal displacement and forced migration. They also represent a barrier to achieving the SDGs and affect global health. The Council therefore calls for further engagement on these issues in relevant multilateral and international fora while paying specific attention to the disproportionate effects on vulnerable people, as well as women and children, including children in armed conflict.

52. The Council welcomes the Communication's ambition, to reinforce partnerships including with the UN, NATO, African Union, OSCE and other key relevant partners, consistent with the EU's wider multilateral climate change and environment agenda and in line with the EU institutional framework and with full respect to EU decision-making autonomy. The Council also welcomes the Joint Pledges of the 11 members of UN Security Council (UNSC) and the efforts of the UN Group of Friends on Climate and Security to systematically drive forward and address the mutual understanding and commitment within the UNSC on the interlinkages between climate, peace and security.

53. The Council underlines the need to mainstream the climate, peace and security nexus in the EU and EU Member States' external action based on an integrated evidence-based whole-of-government approach, and a strengthened climate and environment informed planning and decision-making by the EU and its Member States, as well as an enhanced focus on conflict-sensitivity in climate action. The Council invites the High Representative and the Commission to enhance efforts towards better climate preparedness and improved EU capacity to address security-related challenges linked to climate change and environmental degradation in EU external action, including in the context of EU CSDP missions and operations and by making full use of a dedicated training platform.

54. The Council calls for enhanced global cooperation to address international environmental crime, including trafficking in timber, wildlife, minerals, and waste, as one of the most lucrative forms of organized crime, affecting ecosystems as well as security, rule of law, health and livelihoods of people. In this regard, the Council underlines the importance of implementing the revised EU Action plan against wildlife trafficking with its focus on a stronger global partnership between source, consumer and transit countries.

55. The Council highlights the importance of enhancing the efforts to promote the just and inclusive green transition and support the implementation of global commitments, in close cooperation with partner countries. Building on the Team Europe approach, the Council invites the High Representative, the Commission, and all EU Member States, to jointly intensify the EU's green diplomacy as a political priority through increased coordination, information exchange and cooperation through relevant capital-based networks, including the Green Diplomacy Network (GDN) and the Energy Diplomacy Expert Group, dedicated discussions in relevant geographic and thematic Council Working Groups and at local level. In this vein and through these channels, the Council invites EU Member States, the High Representative and the Commission to regularly exchange views on EU green diplomacy. At local level, the Council encourages an even closer coordination and cooperation between EU Member States' Embassies and EU Delegations, in a Team Europe spirit including through exploring informal green diplomacy hubs, working closely with international partners, to maximise the impact of the EU outreach and support. With these Conclusions, the Council underlines the EU's determination to work with partners to anchor and consolidate global commitments, and to translate these into goals, policies and instruments, with more ambitious NDCs as one of the key vehicles to achieve this. The Council will regularly follow up on EU green diplomacy.

EUROPEAN
COMMISSION

Brussels, 5.10.2022
COM(2022) 521 final

2022/0324 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the 33rd meeting of the Energy Charter Conference in connection with the envisaged adoption of proposed amendments to the Energy Charter Treaty (CC 760) and the approval of (i) proposed modifications and changes to the Annexes to the Energy Charter Treaty (CC 761), (ii) proposed changes to Understandings, Declarations and Decisions (CC 762), and (iii) a decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes (CC 763). The adoption of the amendments to the Energy Charter Treaty and the additional approvals are to be passed simultaneously by the Energy Charter Conference.

The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a multilateral trade and investment agreement applicable to the energy sector that was signed in 1994 and entered into force in 1998. The ECT contains provisions on investment protection, trade and transit in energy materials and products, and dispute settlement mechanisms. The ECT also sets up a framework for international cooperation in the energy field between its 54 Contracting Parties. The European Union is a party to the ECT[1], together with Euratom, 26 EU Member States[2], as well as Japan, Switzerland, Turkey and most countries from the Western Balkans and the former USSR, with the exceptions of Russia[3] and Belarus[4].

The Energy Charter Conference

The Energy Charter Conference is the governing and decision-making body for the Energy Charter process and was established by the ECT. All states or Regional Economic Integration Organisations (such as the EU) who have signed or acceded to the ECT are members of the Conference, which meets on a regular basis to discuss issues affecting energy cooperation among the ECT's signatories, to review the implementation of the provisions of the ECT and the Protocol on Energy Efficiency and Related Environmental Aspects, and to consider possible new instruments and joint activities within the Energy Charter framework. In particular, the Energy Charter Conference adopts texts of amendments to the ECT and approves modifications of, and technical changes to, the Annexes to the ECT. When voting on proposed amendments to the text of the ECT, the Energy Charter Conference passes a decision to adopt the amendments by unanimity vote of the Contracting Parties present and voting. The EU has a number of votes equal to the number of its Member States that are Contracting Parties to the ECT, provided that the EU shall not exercise its right to vote if its Member States exercise theirs, and vice versa.

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1 Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, pp. 1-116).

2 All but Italy that unilaterally withdrew in 2015.

3 The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of the Russian Federation.

4 The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of Belarus and the provisional application of the ECT by Belarus.

The decisions to be taken at the Energy Charter Conference

On 22 November 2022, during its 33rd meeting, the Energy Charter Conference is to take four decisions related to the modernisation of the ECT. These decisions will be taken simultaneously and their purpose is to:

– adopt the proposed amendments to the text of the ECT (CC 760);

– approve the proposed modifications and changes to the Annexes to the ECT (CC 761);

– approve the proposed changes to Understandings, Declarations and Decisions (CC 762); and

– approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763).

In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated. It also became one of the most litigated investment treaties in the world, with EU Member States being the principle target of claims by investors, most of them based in other EU countries. As a result, a modernisation process was initiated in November 2018. The Energy Charter Conference first approved a list of topics for discussion, chiefly concerning provisions related to investment protection. The EU then proposed the removal of protections for investments in fossil fuels, in order to bring the ECT in line with the Paris Agreement.

After 15 rounds of multilateral negotiations held between July 2019 and June 2022, an "agreement in principle" to close negotiations was reached at the extraordinary Energy Charter Conference of 24 June 2022 in Brussels. The revised text of the ECT and its Annexes then underwent a legal revision until mid-August. Thereafter, the final draft decisions (CC 760, CC 761, CC 762 and CC 763) containing the revised texts were shared on 19 August 2022 with all Contracting Parties, including the EU, Euratom, and all EU Member States that are Contracting Parties to the ECT.

At the 33rd meeting of the Energy Charter Conference on 22 November 2022, the decisions related to the modernisation of the ECT will be subject to a unanimity vote. If the vote is successful, i.e. if no Contracting Party raises an objection, the decisions for the modernisation of the ECT will be considered "adopted" by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package.

The provisional application of the amendments to the ECT and the other elements of the modernisation will be governed by the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763). In line with this decision, the modernisation will be provisionally applied by all Contracting Parties automatically as of 15 August 2023. However, any Contracting Party may deliver to the depositary (Portugal) before 23 February 2023 a declaration that it is not able to accept the provisional application of the amendments to the ECT, effectively allowing each Contracting Party to opt out from provisional application. The ECT Secretariat will make such declarations public. Even if a Contracting Party initially makes such a declaration, it may at any time withdraw the declaration again, allowing it to apply the modernisation of the ECT provisionally at a later point in time.

The present proposal for a decision under Article 218(9) TFEU seeks to establish the position to be adopted on the Union's behalf at the 33rd meeting of the Energy Charter Conference regarding the decisions (CC 760, CC 761, CC 762 and CC 763) described above.

At the same time, the Commission is proposing the adoption of a subsequent agreement, within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), between the European Union, Euratom, and the Member States on the interpretation of the ECT. That agreement should include, in particular, a confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU arbitration proceedings, and that the sunset clause does not apply intra-EU. It should also set out the obligations of the Member States in the event that they are involved in arbitration proceedings pursuant to a request based on Article 26 ECT.

It has been the consistent interpretation of the EU that the ECT does not apply to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State. This interpretation was specifically confirmed by the Court of Justice of the European Union (CJEU) in its *Komstroy* judgment[5]. Yet, arbitral tribunals have held and continue to hold, that they are not bound by the judgments of the CJEU. In order to prevent tribunals from continuing to accept jurisdiction in such disputes, it is necessary to reiterate, expressly and unambiguously, the authentic interpretation of the ECT. The most appropriate way to do so is by means of an agreement within the meaning of Article 31(3)(a) VCLT.

While that agreement will codify the interpretation of the EU and its Member States in a separate treaty (something that is possible because of the bilateral nature of the obligations), the ECT modernisation will embed in the text itself and via a "for greater certainty" clause, the understanding of all Contracting Parties that its Article 26 does not apply intra-EU. Both elements will help to remove any ambiguity and eliminate present or future risks of intra-EU arbitration under the ECT with the necessary degree of legal certainty.

Position to be taken on the Union's behalf

The Commission proposes to take, on behalf of the Union, at the 33rd meeting of the Energy Charter Conference on 22 November 2022, the positions described in points 1 to 4 below.

Regarding the adoption of the proposed amendments to the text of the ECT (CC 760)

The proposed amendments to the text of the ECT (CC 760) consist of substantial improvements that will effectively bring the ECT in line with modern standards of investment protection and EU positions in other fora (e.g. UNCITRAL[6]). The amendments will also bring the ECT in line with the EU's approach to investment protection in its recently agreed free trade and investment agreements, as well as with EU energy and climate objectives, including the Paris Agreement.

In particular, the amended ECT contains:

– **New investment protection provisions, in line with modern standards and EU positions**, reaffirming the right of Contracting Parties to take measures to achieve legitimate policy objectives ("**right to regulate**"), including as regards the fight

5 Case C-741/19 *Republic of Moldova v. Komstroy LLC*, 2 September 2021.

6 United Nations Commission on International Trade Law.

against climate change; Only investors with real economic interest will be protected, with no protection being afforded to mailbox companies[7];

– **New provisions on dispute settlement**, protecting Contracting Parties from frivolous claims, foreseeing security for costs, and introducing a high level of transparency to the proceedings;

– **New provisions on sustainable development**, in particular on climate change, the clean energy transition and the Paris Agreement, effectively incorporating the commitments of the Paris Agreement into the ECT, and providing an actionable mechanism in case of misalignment, in a way that was never achieved before in a multilateral investment treaty;

– In addition, the EU secured provisions for regional economic integration organisations (such as the EU), expressly confirming that it is **not possible to bring intra-EU investment arbitration under the ECT**[8], in line with the case law of the Court of Justice of the EU[9];

– **Substantial clarifications regarding to transit-related provisions** to factor in the requirements of integrated energy markets with third party access rights, such as in the EU, without creating new obligations for the EU[10];

– **An updated definition of economic activity in the energy sector**, which, together with Annexes EM/EM I, EQ/EQ I and NI (see point 2 below), allows the EU to align investment protection in the EU with the EU's energy and climate objectives.

The adoption of the amendments to the text of the ECT does not, in principle, have legal effects. Under international law, it is not equivalent to a signature but to the initialling of the negotiated text.

As a result, the Commission proposes to take a position on behalf of the Union at the Energy Charter Conference **supporting** the adoption of the proposed amendments to the ECT (CC 760).

Regarding the approval of the proposed modifications and changes to the Annexes (CC 761)

Article 34(3)(m) of the ECT provides for a simplified procedure empowering the Conference to adopt modifications to the Annexes of the ECT. The proposed changes to the Annexes to the ECT (CC 761) bring about an essential change to the current Treaty: the exclusion, through **Annex NI,** of **certain Energy Materials and Products and activities from the scope of investment protection under Part III of the ECT**. As a result, the EU obtained the right to carve out investment protection in the EU as follows:

– Exclusion of protection for **all new investments in fossil fuels in the EU as of 15 August 2023**, with a transition period for hydrogen/low-carbon gas-ready gas power

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7 Mailbox companies are companies that have a business address in an ECT Contracting Party without having any actual economic activity in such a Contracting Party, only seeking protection under the ECT.

8 Such claims represented the overwhelming majority of claims against EU countries in the last decade, despite the position of the Commission, confirmed by the Court of Justice of the EU, that EU law precludes intra-EU investment arbitration.

9 Case C-284/16 *Slovak Republic v. Achmea BV*, 6 March 2018, and C-741/19 *Republic of Moldova v. Komstroy LLC*, 2 September 2021.

10 Importantly, new commitments related to third-party access, capacity allocation mechanisms and tariffs are "best endeavour" commitments, which are "subject to" the laws and regulations of the EU, and thus would only have to be respected if they do not impinge upon the EU legal framework and the EU's international commitments.

plants and infrastructure emitting less than 380 gCO2/kWh – until 31 December 2030 by default or until 15 August 2033 if they replace a coal, peat or oil shale-fired facility;

– Exclusion of protection for **all existing investments in fossil fuels in the EU as of 10 years after the entry into force (or entry into provisional application) of the amendments to the ECT**, and by 31 December 2040 at the very latest;

– Protection for renewable and low-carbon hydrogen and synthetic fuels only;

– Exclusion of protection for activities in carbon capture, utilisation and storage.

The proposed changes also **bring the scope of the ECT into line with the new landscape of renewable and low-carbon technologies required for the green energy transition. This will be achieved through changes to Annex EM/EMI** (adding new energy materials and products, e.g., hydrogen and derivative fuels such as ammonia and methanol, biomass, biogas and synthetic fuels) **and Annex EQ/EQ I** (adding new energy equipment, e.g., various insulation materials, as well as multiple-walled insulating glass).

In addition, new Annexes have been created to implement the **principle of reciprocity**, according to which Contracting Parties cannot be forced to protect investments from other Contracting Parties if such investments have been excluded by the latter in Annex NI, either by not applying the investor-state dispute settlement mechanism in Article 26 of the ECT (**new Annex IA-NI**) or the entirety of Part III on investment protection (**new Annex NPT)**.

As a result, the Commission proposes to take a position on behalf of the Union at the Energy Charter Conference that **approves** the adoption of the proposed changes and modifications to the Annexes to the ECT (CC 761).

Regarding the approval of the proposed changes to Understandings, Declarations and Decisions (CC 762)

Changes introduced to Understandings, Declarations and Decisions (CC 762) concern corrections of obsolete provisions (e.g., replacing "*European Communities*" with "*European Union*"), as well as additional clarifications for the text of the ECT (e.g., the clarification that "subsidy" includes "State aid" as defined in EU law). The approval of such changes to Understandings, Declarations and Decisions will bring further clarity and precision to the text of the ECT.

As a result, the Commission proposes that the position to be taken on behalf of the Union at the Energy Charter Conference on this matter is to **approve** the proposed changes to Understandings, Declarations and Decisions (CC 762).

Regarding the approval of the decision on the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763)

The Conference will approve a decision that provides for the following modalities of entry into force and provisional application of the proposed amendments to the ECT and the changes to its Annexes (CC 763):

– **The amendments to the text of the ECT** will enter into force in accordance with Article 42(4) of the ECT. This means that the amendments will enter into force once three-fourths of Contracting Parties have ratified them. In addition, the decision provides that the amendments will be provisionally applied by default by all Contracting Parties as of 15 August 2023, unless they lodge a declaration by 23 February 2023 that they are not able to do so;

– **Changes to Section C of Annex NI,** which notably contains the rules providing for the transition period of 10 years to phase out the protection of existing investments in fossil fuels in the EU, **and changes to other Annexes**: these changes will enter into force when the amendments to the ECT enter into force (see above). Section C of Annex NI and changes to other Annexes will be provisionally applied by default by all Contracting Parties unless they make a contrary declaration by 23 February 2023 (see above);

– **Changes to Section B of Annex NI**, which notably contains the rules providing for the exclusion of new investments in fossil fuels from protection in the EU, will enter into force automatically on 15 August 2023 without any further ratification;

– **Changes to Understandings, Declarations and Decisions** will enter into force on 22 November 2022 as far as they concern corrections of obsolete references. The remaining changes will enter into force when the amendments to the ECT enter into force. In the meantime, they will apply provisionally in the same way as the amendments to the ECT.

The modalities of entry into force and provisional application of the amendments to the ECT and of Section C of Annex NI, as well as the changes to other Annexes, are in conformity with the provisions of the original ECT as regards entry into force and provisional application. In addition, the EU achieved that Section B of Annex NI enters into force automatically as of 15 August 2023, further securing the date of entry into force of the EU's carve-out for investments in fossil fuels regarding new investments.

As a result, the Commission proposes that the position to be taken on behalf of the Union at the Energy Charter Conference on this matter is to **approve** the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763).

The subject matter of the envisaged decisions concern an area for which the Union has exclusive external competence by virtue of Article 3(1) TFEU, namely the common commercial policy. The envisaged decisions concern rules on trade and the protection of foreign direct investment, which fall within this area of exclusive Union competence.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Procedural legal basis

Principles

Article 218(9) TFEU provides for decisions establishing "*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of this agreement*".

The concept of "*acts having legal effects*" includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are "*capable of decisively influencing the content of the legislation adopted by the EU legislature*"[11].

Application to the present case

[11] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

The Energy Charter Conference is a body set up by an agreement, namely the Energy Charter Treaty.

The acts which the Energy Charter Conference is called upon to adopt constitute acts having legal effects. These acts will be binding under international law.

The decisions to be adopted by the Energy Charter Conference to approve the proposed modifications and changes to the Annexes to the ECT (CC 761), as well as to approve the proposed changes to Understandings, Declarations and Decisions (CC 762), constitute acts having binding legal effects under international law. This is because the ECT grants the Energy Charter Conference the power to amend the Annexes, Understandings, Declarations and Decisions to the ECT without the need for any subsequent ratification by the Contracting Parties. Under Article 48 of the ECT, the Annexes and Decisions are an integral part of the Treaty.

The decision to be adopted by the Energy Charter Conference to approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763) constitutes an act having binding legal effects under international law because it obliges the Contracting Parties to provisionally apply the amended text of the ECT and the changes to certain sections of its Annexes as of 15 August 2023, if no contrary declaration is lodged before 23 February 2023.

The decision to be adopted by the Energy Charter Conference to adopt the proposed amendments to the text of the ECT (CC 760) constitutes, in the particular circumstances of the case, an act having binding legal effects under international law because it is to be adopted simultaneously with the decision regarding the entry into force and provisional application of amendments to the text of the ECT (CC 763 – see above), which obliges the Contracting Parties to provisionally apply these amendments as of 15 August 2023 if no contrary declaration is lodged before 23 February 2023.

The envisaged decisions do not supplement or amend the institutional framework of the ECT.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

Substantive legal basis

Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged decisions in respect of which a position is taken on the Union's behalf. If the envisaged decisions pursue two aims or have two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

With regard to envisaged decisions that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

Application to the present case

The envisaged decisions pursue objectives and have components in the area of energy and the common commercial policy. These elements of the envisaged decisions are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Articles 194(2) and 207 TFEU.

Conclusion

The legal basis of the proposed Council decision should be Articles 194(2) and 207 TFEU, in conjunction with Article 218(9) TFEU.

Publication of the envisaged acts

As the decisions of the Energy Charter Conference will amend the Annexes to the ECT, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

2022/0324 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 194(2) and 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Energy Charter Treaty ('the Agreement') was concluded by the Union by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, pp. 1-116) and entered into force on 16 April 1998.

(2) Pursuant to Article 34 of the Agreement, the Energy Charter Conference adopts texts of amendments to the Agreement and approves modifications of, and techhnical changes to, the Annexes to the Agreement.

(3) The Energy Charter Conference, during its 33rd meeting on 22 November 2022, is to adopt the proposed amendments to the Energy Charter Treaty (CC 760) and to approve (i) the proposed modifications and changes to the Annexes to the Energy Charter Treaty (CC 761), (ii) the proposed changes to Understandings, Declarations and Decisions (CC 762), and (iii) the decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes (CC 763).

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Energy Charter Conference, as the abovementioned acts will be binding on the Union.

(5) In the absence of any substantial update of the Agreement since the 1990s, the Agreement became increasingly outdated. It is appropriate to amend the Agreement to bring it into alignment with the principles of the Paris Agreement, the requirements of sustainable development and the fight against climate change, as well as with modern standards of investment protection.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 33rd meeting of the Energy Charter Conference shall be the following:

(a) to support the adoption by the Conference of the proposed amendments to the Energy Charter Treaty (CC 760);

(b) to approve the proposed modifications and changes to the Annexes to the Energy Charter Treaty (CC 761);

(c) to approve the proposed changes to Understandings, Declarations and Decisions (CC 762); and

(d) to approve the decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes (CC 763).

Article 2

This Decision is addressed to the European Commission.

Done at Brussels,

For the Council
The President

Non-paper from the European Commission

Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty

DISCLAIMER

This non-paper has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

1. Purpose of the non-paper

This non-paper aims at guiding a discussion with Member States on the possible options available to EU, Euratom and Member States as regards their respective membership in the Energy Charter Treaty (ECT) in light of the absence of EU and Euratom positions on the modernisation of the ECT and of the outcome of the Energy Charter Conference of 22 November 2022.

2. Background

The negotiations on the modernisation of the ECT were concluded on 24 June 2022 after 15 rounds of negotiations, achieving an outcome in line with the negotiating directives received from the Council. The modernised ECT was scheduled for adoption by the Energy Charter Conference on 22 November 2022.

Despite the efforts to build a compromise allowing the EU and Euratom to take a position at the Conference, the proposed Council decision for the EU and Euratom to endorse the modernised ECT was rejected in Coreper on 18 November 2022.

Consequently, in agreement with the Member States, the Commission requested the removal of the modernisation of the ECT from the agenda of the Energy Charter Conference. The practical consequence is that the modernisation was neither adopted nor rejected by the Energy Charter Conference. In the absence of an EU and Euratom endorsement of the modernisation of the ECT, the unmodernised ECT – which is not in line with the EU's policy on investment protection or the Green Deal – continues to apply.

In addition, the European Parliament adopted a resolution on the modernisation of the ECT on 24 November 2022 – supported by a coalition composed of S&D, Greens/EFA, The Left, and Renew – calling on the Commission and Member States to start preparing both a

coordinated exit from the ECT, and an agreement excluding the application of the sunset clause between willing Contracting Parties.[1]

3. Options available to the EU, Euratom and Member States

In this context, the Commission has assessed the options for a way forward regarding the EU, Euratom and Member States' membership in the Energy Charter Treaty.

Considering the outcome of Coreper on 18 November 2022, securing a Council Decision that allows for an endorsement of the modernised ECT does not appear feasible in current circumstances. As a result, the EU, which had requested the modernisation of the ECT in the first place and has been the most active Contracting Party in pushing for an ambitious reform during the negotiations, is now in a situation where it effectively blocks its adoption by other Contracting Parties.

It is also understood that, due to the above stance of Member States in the Council and several Member States' announcements to withdraw from the ECT, leaving aside whether other Contracting Parties would actually be interested, re-negotiating the outcome of the modernisation process does not seem feasible.

At the same time, remaining in an unmodernised ECT is not an option either. Indeed, the unmodernised ECT is not in line with the EU policy on investment protection and the EU Green Deal:

- The unreformed substantive standards of investment protection, as well as the ISDS (investor-to-State dispute settlement) mechanism for enforcing such standards are not compatible with the EU approach to investment protection;
- The protection granted by the unmodernised ECT to fossil fuel investments, including new investments, for an unlimited period of time, and in conditions deprived of any of the benefits afforded by the modernised Treaty – such as recalling the right of States to regulate, especially in view of achieving climate and environmental objectives in line with the Paris Agreement – would clearly undermine EU efforts to decarbonise its energy mix and achieve climate neutrality by 2050.

Yet, in the absence of a position in the Council and given the position of the European Parliament, it appears there is no scenario in which the EU and Euratom could allow the adoption of the modernised ECT, ratify it and remain party to a modernised ECT. As a result, a withdrawal of the EU and Euratom from the Energy Charter Treaty appears to be unavoidable.

The options presented below aim at facilitating the discussion. The Commission services consider option 1 as the most adequate option, taking into account the different dimensions of this debate.

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[1] European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)).

<u>Option 1:</u> Coordinated withdrawal of EU, Euratom and Member States from the ECT

In this scenario, the EU, Euratom and Member States would engage in a parallel process of withdrawal from the ECT.

Regarding the EU and Euratom, the procedure would be as follows:

For the EU: a decision of the Union to terminate an international agreement must be adopted on the same legal basis, and following the same procedure, as a decision to conclude that agreement on behalf of the Union. Therefore, the withdrawal of the European Union from the ECT requires the adoption of a Council decision based on Article 218(6)(a) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with the relevant substantive legal bases (in principle, Articles 207 and 194 of the TFEU), and the consent of the European Parliament.

Following the reasoning of the most recent case law of the Court of Justice on the decision-making for mixed agreements, namely Opinion 1/19 on the Istanbul Convention, it is clear that a decision of the Council to let the EU withdraw from the ECT must be adopted by qualified majority. A prior "common accord" by all MS cannot be required in place of a qualified majority in the Council.

The European Parliament would need to give its consent. Given the position taken in the resolution of 24 November 2022, it is likely that the European Parliament would give its consent.

For Euratom: the termination procedure would generally follow from Article 101, second paragraph of the Euratom Treaty, which is similar to the rules set out in Articles 218 TFEU, albeit with a lesser role for the European Parliament (which is informed but does need to give its consent).

For **Member States**: withdrawal would be subject to the applicable domestic rules.

Arguments

First, as previously explained, it is clear that, in the current setup, the ECT cannot be modernised. Givem that the **unmodernised Treaty is not in line with the EU policy** on investment protection or the EU Green Deal, membership of the unmodernised Treaty is neither legally nor politically sustainable, as reflected also by the positions of several Member States that have recently announced to withdraw form the Treaty.

Second, the provisions of the ECT (other than on ISDS) largely fall within the areas of **EU exclusive competence**. Pursuant to Article 2(1) TFEU, only the Union may act in the areas falling within EU exclusive competence. Member States could only remain in the ECT and act in these areas of exclusive competence if empowered by the Union to do so.

Third, pursuant to the **principle of sincere cooperation** in Article 4(3) of the Treaty on European Union (TEU), Member States must take any appropriate measure to ensure the

fulfilment of the obligations arising out of the Treaties or resulting from the acts of EU institutions; facilitate the achievement of the Union's tasks; and refrain from taking any measure that could jeopardise the attainment of the Union's objectives. Arguably, by remaining Contracting Parties to the ECT, Member States may impinge on the obligations arising from the acts of EU institutions of the Union that decided an EU withdrawal from the ECT and risk jeopardising the attainment of the Union's objective in the fields of energy and trade policy.

<u>Option 2:</u> Withdrawal of the EU and Euratom with prior authorization for some Member States to remain party to a modernised ECT

Pursuant to Article 2(1) of the TFEU, the Union may authorise those EU Member States that want to remain Contracting Parties to the ECT to vote in favour of the modernisation at a future Energy Charter Conference and subsequently to remain party to the ECT. This option would allow for the modernisation of the ECT to be adopted, also for the benefit of non-EU Contracting Parties.

It is important to note that the Member States could only remain party to the ECT provided that the modernisation is effectively adopted and that there is reassurance that it enters into force within a reasonable time.

The prior authorisation would be necessary for Member States to vote in favour of the modernisation in the Energy Charter Conference, but also for the subsequent ratification of the amendments to the treaty. The prior authorisation would also have to lay down the conditions for the Member States to remain Contracting Parties. Effectively, the legislative act providing for the prior authorisation would not only have to include the mere empowerment of Member States to remain Contracting Parties to the ECT when the EU has withdrawn, but would also have to establish mechanisms for the coordination of Member States' actions within the ECT and the cooperation with the EU-level. This would be necessary to ensure compliance with the EU's overall policy on trade and investment. The mechanisms for the continuous coordination and cooperation between the remaining Member States and the EU would in practice have to foresee individual acts to be adopted by the Commission, similarly to the mechanisms established under the Grandfathering Regulation for BITs.[2]

The legal basis for prior authorisation is normally Article 2(1) TFEU in combination with a substantive legal basis (namely the energy and trade legal bases under Articles 194 and 207 TFEU). The applicable procedure is co-decision, requiring thereby the vote of the Council and European Parliament, while the European Parliament has clearly indicated that it favours a coordinated withdrawal.

[2] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40–46.

The Euratom Treaty does not foresee an authorisation procedure. If Member States were to remain party to the ECT, it could be argued that they would have to submit notifications to the Commission on the basis of Article 103 of the Euratom Treaty.

Arguments

This approach could facilitate constructive discussions that could enable a compromise in the Council, but this would be one which involves significant complexity and an administrative burden, where some Member States remain a Contracting Party, while the EU, Euratom and a significant number of other Member States withdraw from the ECT.

Option 3: Council decision allowing adoption of the modernisation followed by the (coordinated) withdrawal of the EU, Euratom and Member States

Completing the procedure to withdraw from the ECT will take time – regardless of whether the EU and Euratom leave the Treaty alone or in a coordinated way with Member States. In the meantime, the adoption of the modernised ECT is blocked for other Contracting Parties.

It would be possible for the EU and Euratom to allow the adoption of the modernised ECT by the Energy Charter Conference while starting proceedings for their withdrawal in parallel. This would require the adoption of a Council decision pursuant to Article 218(9) of the TFEU (as regards the EU) and Article 101 second paragraph of the Euratom Treaty (as regards Euratom) such as the ones blocked in Coreper on 18 November 2022. Therefore, Member States having abstained from the Coreper vote on 18 November 2022 would need to reflect as to whether the current situation – including a perspective for the EU and Euratom to withdraw from the ECT – would lead to an adjustment of their initial position.

Arguments

The modernised ECT could be adopted, before a withdrawal process would be initiated, but this would run counter to the public and political announcement already made by a number of Member States, while also being disingenuous vis-à-vis other non-EU Contracting Parties.

4. Practical implications of a withdrawal from the ECT

The practical consequences of a withdrawal from the ECT are spelled out in paragraphs 2 and 3 of Article 47 of the ECT.

Pursuant to Article 47.2 of the ECT, one year after the date of the receipt of the withdrawal notification by the depositary, **new investments** will no longer be protected under the unmodernised ECT.

Pursuant to the **sunset clause** enshrined in Article 47.3 of the ECT, **existing investments** will continue to be protected under all the provisions of the unmodernised ECT for a **period of 20 years** counting from the moment the withdrawal becomes effective, i.e. one full year after the withdrawal notification has been received by the depositary. This is valid both for foreign investments made in the territory of the former Contracting Party, and for

investments made by the former Contracting Party in the territory of other remaining Contracting Parties.

In practice, the following can be expected for the EU:

- Most energy investments in the EU are intra-EU investments, and therefore, have never been covered by the ECT's dispute settlement provisions[3];
- Existing EU investments in the territory of other Contracting Parties and investments by other Contracting Parties in the territory of the EU would remain protected for 20 years after the expiry of the one-year period for the notification of withdrawal to become effective, under the conditions set out in the unmodernised Treaty;
- New investments by ECT Contracting Parties in the EU would not be protected under the ECT after the expiry of the one-year period for the notification of withdrawal to become effective. Our general assessment is that modes of investment protection such as the one provided by the ECT are not required to attract investments in the EU, given the levels of access to justice and rule of law – especially not in the energy sector, where the EU energy market is dynamic and very attractive. Therefore, a withdrawal from the ECT should not have major effects on decisions by actors from Japan, the UK, Switzerland, Azerbaijan or any other ECT Contracting Party to invest in the EU energy sector;
- New EU investments in the territory of other Contracting Parties would no longer be protected either after the expiry of the one-year period for the notification of withdrawal to become effective. Key investments could still benefit from additional guarantees, including those enshrined in contracts between the investor and the host State.

While the ECT, including the sunset clause, does not apply, and has never applied between the EU Member States, arbitral tribunals have often taken a different view. The risk of application by arbitration tribunals of the unmodernised ECT in intra-EU relations pursuant to the ECT sunset clause could be mitigated by the negotiation of an *inter se* Agreement amongst the EU, Euratom and the Member States, confirming that the ECT in its entirety does not apply, and has never applied, in intra-EU relations. This negotiation is currently ongoing. Such an agreement would however not exclude the application of the ECT between the EU and its Member States, on the one hand, and non-EU Contracting Parties, on the other, or the application of the sunset clause in the case of a withdrawal from the ECT. For that, it would be necessary to conclude another *inter se* agreement with willing non-EU Contracting Parties, as requested by the European Parliament in its resolution of 24 November 2022. This appears however challenging given the current position of non-EU Contracting Parties on the ECT as a whole and their possible business interests currently covered by the ECT. For the time being, no non-EU Contracting Party has indicated they would be open to such a solution.

Beyond what purely concerns investment protection, a withdrawal from the ECT also means **ceasing to contribute to the international organisation that implements the Treaty** and to **participate in its internal processes**. The EU and Euratom do not contribute to the ECT

[3] As per the Court of Justice's case law in *Republic of Moldova*, Case C-741/19.

budget but Member States do – their withdrawal from the ECT will therefore have an impact on the functioning of the Energy Charter Secretariat irrespective of the EU and Euratom withdrawal. In addition, the EU has been the main promoter of the modernisation of the ECT.

BRIEFING

European Parliament

EU withdrawal from the Energy Charter Treaty

SUMMARY

On 7 July 2023, the European Commission published a proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty (ECT) – a multilateral agreement that regulates energy investment. This comes after a previous proposal to modernise the ECT did not gather the required majority among Member States. The lack of an EU position de facto blocks the ECT modernisation process. Due to many concerns over the protection of fossil fuel investements and amid the lack of prospects for change, several countries have announced their intention to withdraw unilaterally. France, Germany and Poland are due to leave the ECT by the end of 2023 and Luxembourg by mid-2024. Additionally, the Netherlands, Slovenia, Spain and, more recently, Denmark, Ireland and Portugal have announced their intention to leave unilaterally.

The Commission now proposes a coordinated withdrawal by the Union and its Member States, as it considers the Treaty to be no longer compatible with the EU's climate goals under the European Green Deal and the Paris Agreement, predominantly due to concerns over continued fossil fuel investments. Another concern relates to the specifics of the investor-state dispute settlement mechanism. The rulings of international arbitration tribunals are rarely in the public domain, with few opportunities for legal redress and oversight; the majority of cases have been launched against EU Member States, often by investors headquartered in the EU. The Court of Justice of the European Union (CJEU) judgment from September 2021 found it to be contrary to EU law, as it excluded the CJEU from jurisdiction over intra-EU disputes in its areas of competence.

A qualified majority of Member States need to back the Commission proposal to withdraw. The procedure requires that the Commission notify the ECT secretariat about the withdrawal of the EU as a whole and that each country does so on its own account. However, some countries have already signalled that they prefer to stay within the ECT.

The European Parliament will be asked to give its consent to the EU withdrawal and has already announced in a resolution that there is a required majority to approve the withdrawal. Due to the sunset clause, the parties are bound by the ECT provisions for 20 years after the withdrawal.

IN THIS BRIEFING

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Members' Research Service

PE 754.632 – December 2023

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Introduction

The Energy Charter Treaty (ECT) is a multilateral agreement that provides a binding framework for energy cooperation between its 53 contracting parties, which consist of 51 member countries plus the EU and Euratom. The ECT was signed in December 1994 and has been in force since April 1998. It is complemented by the European Energy Charter (1991) and the International Energy Charter (2015), which are non-binding political declarations setting out the goals of the Energy Charter process. Some countries have signed one or both of these political declarations but not ratified the ECT. By the fact of signing one of the political declarations, a party becomes an observer to the Energy Charter Conference. It is an inter-governmental organisation consisting of members (those who ratified the ECT) and observers (signatories of political declarations) and is a governing and decision-making body for the Energy Charter process. The Energy Charter secretariat is based in Brussels.

The ECT covers the full process of energy investment, production, supply and consumption. It was born in a geopolitical context after the fall of the Soviet Union (USSR), when many Western countries and their companies wanted to invest in modernising the energy sectors of central and eastern Europe, but were concerned about the legal protection of their investments. The ECT's sunset clause requires signatory states who wish to exit to comply with its provisions for 20 years after withdrawal.

Energy Charter Treaty provisions

The ECT aims to establish a multilateral framework for energy cooperation while promoting energy security through support to competitive energy markets. The Treaty, with its 50 articles, focuses on four areas: the protection of foreign investments and protection against key non-commercial risks; non-discriminatory treatment in energy trade and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation; resolution of disputes between member states and foreign investors, involving the use of international arbitration mechanisms; and the promotion of energy efficiency and environmental protection.

A study conducted for the European Parliamnet's Legal Affairs (JURI) Committee explains that exit from the ECT is subject to two sectional sunset clauses introduced into the treaty in order to achieve long-lasting cooperation. A first sectional sunset clause in Article 47.2 extends the validity of the treaty for one year after the date on which the notification of the withdrawal is recieved. After this time, the treaty automatically expires and does not apply to new investments. A second sectional sunset clause in Article 47.3 extends the validity of the provisions applying to existing investments for 20 years from the date on which the withdrawal takes effect. The combination of both sunset clauses shows that after unilaterally leaving the treaty, the party is bound by the provisions of the ECT regarding existing investments for 21 years from the notification date. By way of example, in this period the countries 'shall in no way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of an investment'.

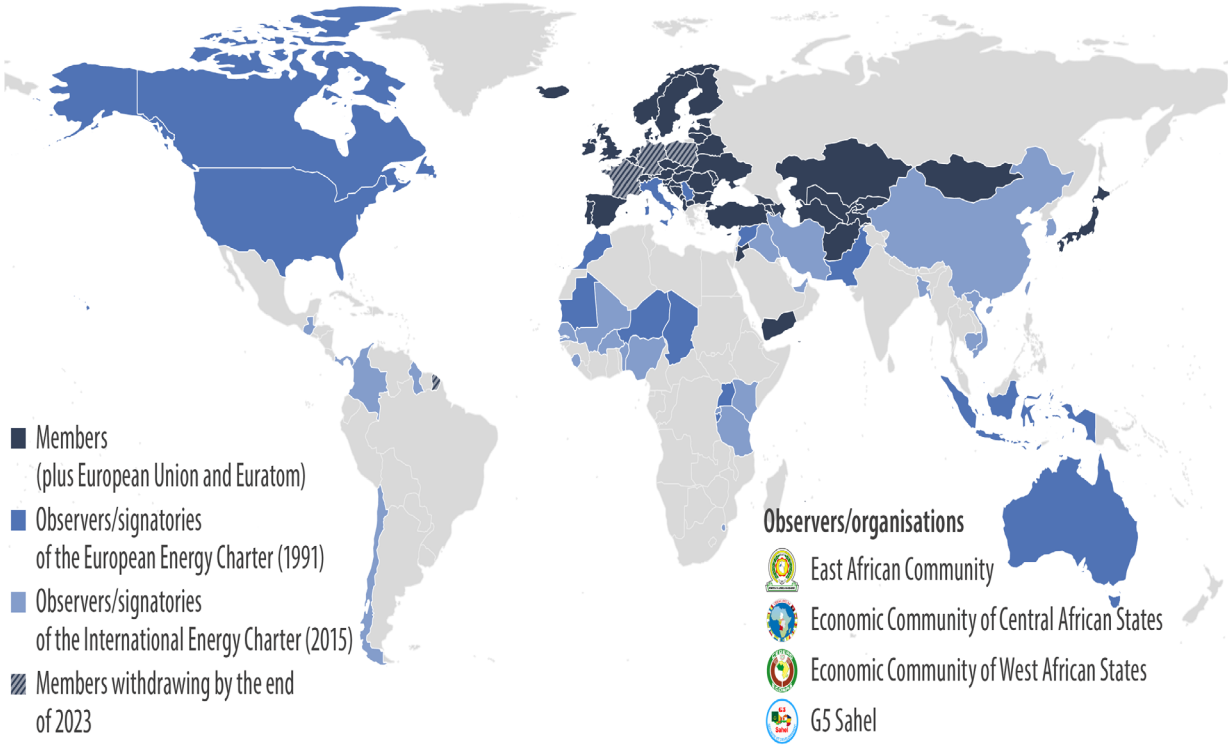
The European Union and the ECT

The EU and its Member States are original contracting parties to the ECT, and still account for over half of its members. Except for Italy, which withdrew in 2016, all EU Member States are currently party to it. Four EU countries have formally notified their withdrawal: France is due to leave the ECT on 8 December 2023, Germany on 20 December 2023, Poland on 29 December 2023 and Luxembourg on 17 June 2024. Other European countries that have ratified the treaty include Western Balkan and EFTA/EEA countries, as well as the United Kingdom. The rest of the contracting parties are energy-producing and transit countries in the former USSR, which developed strong energy supply chains to western Europe during the Cold War.

Russia was an original contracting party, but never ratified the ECT and ultimately withdrew in 2009. The country was an observer, as a signatory of the 1991 European Energy Charter, but this status was revoked in June 2022 because of its war of aggression against Ukraine. At the same meeting,

the Energy Charter Conference suspended the membership and observer status of Belarus because of the breach of Article 18 of the ECT due to the country's involvement in Russia's aggression against Ukraine. Japan remains an important and active contracting party, yet few other countries in Asia, Africa, America or the Middle East have ratified the ECT.

Figure 1 – Members and observers of the Energy Charter Process



Source: Energy Charter website.

EU concerns about the ECT

Over the years, the EU has repeatedly raised concerns about the ECT provisions relating to investment protection, which allow companies headquartered in any member state to sue the government of another member if it harms their existing energy investments. The rulings of international arbitration tribunals are rarely in the public domain, and there is little awareness about the real costs involved (e.g. legal fees, damages awarded). Moreover, there are few opportunities for legal redress and oversight of arbitration decisions via national courts and the Court of Justice of the European Union (CJEU). The ECT secretariat is not informed automatically about arbitration cases that draw on the ECT, and instead monitors the process independently. It has compiled a database of 150 known arbitration cases.

The other concern is that the majority of cases have been launched against EU Member States, often by investors headquartered in Europe. A CJEU judgment in September 2021 found that this was against EU law, because it excluded the CJEU from ultimate jurisdiction over intra-EU disputes in its areas of competence. Additionally, the EU believes the treaty is no longer compatible with the EU's climate goals under the European Green Deal and the Paris Agreement, due to concerns over continued fossil fuel investments. One example from April 2021 that turned public opinion against the ECT was when German energy companies RWE and Uniper sued the Netherlands for €2.4 billion for passing a law banning coal-fired power plants after 2030.

ETC modernisation process

In light of the growing legal and political concerns about the ECT, a modernisation process driven by the EU and its Member States was initiated, focusing on investment protection standards, limiting the protection granted to fossil fuels and fostering sustainable development. In July 2019,

the Council gave the Commission a mandate to negotiate a profound modernisation of the ECT. In May 2020, the EU submitted its proposal for the modernisation of the ECT to the Energy Charter secretariat, focusing on regulatory improvements rather than radical change. A supplementary proposal of February 2021 added a 'fossil fuel carve-out' (i.e. exclusion of fossil fuel investment protection) and a 'sunset clause' lasting until 2040 for future ECT-related disputes concerning fossil fuel investments.

Negotiations started in July 2020, and after 15 rounds the parties reached an 'agreement in principle'. The proposed text included a clause which would end arbitration cases between investors and member countries that are both located in the EU. The proposal aimed to allow parties not to grant investment protection to new fossil fuel-related investments and to phase out protection for existing investments. This phasing out of protection would happen within a shorter timeframe than in the scenario of a withdrawal from the ECT. The proposal envisaged phasing out existing fossil fuel investments after 10 years (instead of 20 years under current rules) and exclusion of new investment after 9 months.

In October 2022, the Commission published a proposal for a Council decision to modernise the ECT, but this proposal failed to gather the required majority in the Council. Some Member States felt the modernisation proposal does not go far enough to meet their climate ambitions. The disagreements mainly concerned environmental issues and the investor-state dispute settlement mechanism; as a result, the EU has blocked the ECT modernisation process.

Several EU countries have announced their intention to unilaterally withdraw from the ECT. Germany, France, Poland and Luxembourg have officially notified the ECT of their withdrawal, and the Netherlands, Slovenia and Spain have announced their intention to do so. More recently, Denmark, Ireland, Portugal and, among non-EU countries, the UK have announced their intention to withdraw unilaterally.

Ongoing procedure

On 7 July 2023, the Commission published a proposal for a Council decision on the withdrawal of the Union from the ECT and withdrew its previous proposal to modernise the treaty. In the new proposal, the Commission stated that remaining a contracting party to the unmodernised ECT is not an option for the EU or its Member States because the current treaty – especially the parts on investment protection – is at odds with the EU's energy and climate goals as well as the EU's investment policy. The unmodernised ECT is incompatible with the principle of autonomy of Union law, while the protection granted to fossil fuels does not fit with EU objectives as defined in the European Green Deal, the REPowerEU plan or the Climate Law. The ECT Secretary-General, in his statement following the Commission proposal, asked the EU Member States to adopt a decision not to object to modernisation of the ECT, as the lack of a common EU position was an impediment to approving the 'agreement in principle' from June 2022.

The Parliament will be required to give its consent to the withdrawal by an absolute majority. The issue has been assigned to the Industry, Research and Energy (ITRE) Committee, with the International Trade (INTA) Commitee giving an opinion. In the Council, the Working Party on Energy deals with the ETC, with the participation of delegates from the Trade Policy Committee (Experts Services and Investment). A qualified majority of Member States need to back the Commission proposal; discussions in the Council are ongoing.

The procedure requires that the Commission notify the ECT secretariat of the withdrawal of the EU as a whole (it would need to do the same on behalf of Euratom). It is also necessary that each Member State notify the secretariat of its own withdrawal. The procedure is not clear in a scenario in which the EU agrees by qualified majority and notifies its joint withdrawal and some EU Member States refuse to give notice on their own account. In this case, the Commission could take legal action against a Member State. According to press accounts, some countries (Cyprus, Greece, Hungary and Slovakia) have already signalled their hesitancy towards leaving the ECT themselves.

European Commission's position

The Commission believes that the current legal uncertainty risks damaging the EU's relations with non-EU contracting parties to the ECT. From a legal and policy point of view, a coordinated withdrawal of the EU, Euratom and all remaining Member States is the best solution. As most provisions of the ECT fall under exclusive Union competence, Member States cannot remain parties to it unless they are empowered by a legal act adopted by the EU. The Commission states that the EU and its Member States need to have a coordinated approach when pursuing investment, climate and environmental policies.

European Parliament's position

The European Parliament, in its November 2022 resolution on the outcome of the modernisation of the Energy Charter Treaty, considers the current treaty to be an outdated instrument that no longer serves the interests of the European Union, especially with regard to the objective of becoming climate neutral by 2050. It underlines that the proposal for a modernised ECT is not in line with the Paris Agreement, the EU Climate Law or the European Green Deal. The Parliament urged the Commission and the Member States to start preparing a coordinated exit from the ECT and indicated that it will support the EU's exit from the ECT when requested to give its consent.

Outlook

The withdrawal of the EU from the ECT is highly likely but its timing cannot be predicted at this point. The European Parliament organised a debate on the next steps regarding the ECT on 4 October 2023. Meanwhile, discussions in the Council are ongoing.

Most Member States agree that the EU should leave the ECT. The biggest supporters of the coordinated withdrawal of the EU and its Member States are countries that abstained when the proposal for a Council decision on ECT modernisation was voted in October 2022, namely France, Germany and the Netherlands. The fourth country to have abstained was Spain. All the countries forming the blocking minority have already notified their withdrawal or signalled their intention to leave the ECT.

Some Member States would have preferred to be given an option to stay within the modernised treaty. Such a proposal, combining withdrawal of the Union with allowing Members States to remain part of the modernised ECT, was discussed under the Swedish Presidency. It would require a second Council decision authorising those Member States not to oppose approval of the modernisation package, but the Commission excluded such an option for legal reasons. Any movement within the Council on the draft Council decision on a coordinated EU withdrawal would be conditional on the Commission's openness to allowing interested countries to approve ECT modernisation. The European Parliament has already publicly stated that there is a majority inside the House to consent to the EU's withdrawal.

Two uncertainties remain. The first is the course of action taken by those Member States which prefer to stay within the ECT in a scenario in which a qualified majority can be found for EU withdrawal within the Council. It is possible that the threat of legal action by the Commission would be enough to deter the unwilling Member States from not joining the coordinated withdrawal. The second is a sunset clause; ECT signatories remain bound by a 20-year sunset clause, meaning that they can be taken to court long after withdrawing from the treaty. Some commentators think it would make more sense to first approve the modernisation of the ETC and then leave, as the proposal for a modernised treaty envisages a sunset clause of 10 years. For a long time, that was also the position of the Commission, but this course of action proved impossible due to the lack of support from Member States for the modernisation proposal. The Parliament also expressed its criticism of the modernisation proposal in its November 2022 resolution. Other experts point out that if the EU leaves all at once, the political vacuum may be filled by other ambitious states, as Turkey or even China may find the South Caucasus and Central Asia an interesting area in which to pursue their interest in energy policy.

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2024/1638

5.6.2024

COUNCIL DECISION (EU) 2024/1638

of 30 May 2024

on the withdrawal of the Union from the Energy Charter Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 194(2) and 207(4), first subparagraph, in conjunction with Article 218(6), second subparagraph, point (a)(v), thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament [1],

Whereas:

(1) The Energy Charter Treaty (the 'ECT') was concluded by the Union by Council and Commission Decision 98/181/EC, ECSC, Euratom [2], and entered into force on 16 April 1998.

(2) In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated.

(3) In 2019, the Contracting Parties to the ECT (the 'Contracting Parties') engaged in negotiations aimed at modernising the ECT in order to bring it into alignment with the principles of the Paris Agreement [3], the requirements of sustainable development and the fight against climate change, as well as with modern standards of investment protection.

(4) During an ad-hoc Conference on 24 June 2022, the Contracting Parties reached an agreement in principle on the modernised text, thus concluding the negotiations, without prejudice to the final assessment by the Contracting Parties. The negotiated outcome was meant to be adopted at the 33rd meeting of the Energy Charter Conference (the 'Conference') on 22 November 2022.

(5) Ahead of the meeting of the Conference, the Union has not adopted a position on the modernisation of the ECT.

(6) In the absence of a Union position, the Union is unable to vote on the adoption of the modernised ECT at the Conference.

(7) Considering all the above, the Union should withdraw from the ECT.

(8) Several Member States have expressed their support for the proposed amendments to the ECT and have indicated their intention to remain Contracting Parties, subject to its modernisation. Those Member States should therefore be allowed, through a separate Council decision, to approve or not oppose the modernisation of the ECT at the Conference that will adopt that modernisation.

(9) Pursuant to Article 47(1) of the ECT, a Contracting Party can give written notification of its withdrawal from the ECT to the Depository of the ECT, namely the Portuguese Republic. Pursuant to Article 47(2) of the ECT, such a withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification by the Depositary.

(10) The Union should withdraw from the ECT,

HAS ADOPTED THIS DECISION:

Article 1

The Union shall withdraw from the Energy Charter Treaty ('the ECT').

[1] Consent of 24 April 2024 (not yet published in the Official Journal).
[2] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, p. 1).
[3] OJ L 282, 19.10.2016, p. 4.

Article 2

The President of the Council shall, on behalf of the Union, give written notification in accordance with Article 47(1) of the ECT, of the withdrawal of the Union from the ECT.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 30 May 2024.

For the Council

The President

T. VAN DER STRAETEN